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PRE-CONVENTION ISSUE

Annual Meeting, Galen Hall, Wernersville, Pennsylvania
September 4, 5, 6

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PURPOSE

The purpose of this Association shall be to bring into close contact by association and communication lawyers, barristers and solicitors who are residents of the United States of America, or any of its possessions, or of the Dominion of Canada, or of the Republic of Cuba, or of the Republic of Mexico, who are actively engaged wholly or in part in practice of that branch of the law pertaining to the business of insurance in any of its branches, and to Insurance Companies; for the purpose of becoming more efficient in that particular branch of the legal profession. and to better protect and promote the interests of Insurance Companies authorized to do business in the United States or Dominion of Canada or in the Republic of Cuba, or in the Republic of Mexico; to encourage cordial intercourse among such lawyers, barristers and solicitors, and between them and Insurance Companies generally.

President's Page

WE NOW HAVE come to the end of this series of the President's Page, and in the next issue of the JOURNAL you will see the photograph of the new president and will read his message. The honor which you conferred upon me almost two years ago will be highly prized, and I thank you, both for the distinction you gave to me and for your own wholehearted cooperation without which the pre-eminence of the Association could not have been maintained. It has been a pleasure and privilege to work with you and to have had a part in preparing for the very important future. To those who will continue to be, and who will become your officers go the best wishes and assurances of every one whose term soon will end.

In this issue of the JOURNAL are presented the reports of some of the standing committees and others will be published later. All, you will find, constitute valuable contributions representing the combined efforts of the chairmen and members of the committees, every one of whom has made a distinct sacrifice for the good of the Association. Nothing gives more assurance of the organization's future than does the willingness of its members to undertake any assignment and carry it through to a creditable conclusion. We all acknowledge our indebtedness to those who, as committeemen, have assisted in the all-important work of their various groups and express to them our congratulations and gratitude.

Dave McAlister, Price Topping and Mark Townsend recently returned from a trip of inspection made to Galen Hall and, through their extended report appearing in this issue, they provide a great deal of information about the place of the annual meeting to be held on September 4th, 5th and 6th. From what they tell us of the requests for registration there appears to be no doubt that more than ever before will answer to the call of the roll. Dave McAlister will be glad to furnish any additional information, so if you have any questions you should write to him.

The program of this year's meeting is published herewith, but gives only an outline of the enlightenment, good fellowship and entertainment which that meeting will produce. When you have read the McAlister-Topping-Townsend report and the program it surely will be apparent that a trip to Wernersville is a must with which nothing should interfere.

We shall be seeing each other in September!

F. B. BAYLOR,
President.

PROGRAM

THE INTERNATIONAL ASSOCIATION OF INSURANCE COUNSEL
ANNUAL CONVENTION—SEPTEMBER 4, 5, 6, 1946,
GALEN HALL, WERNERSVILLE, PA.

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TUESDAY, SEPTEMBER 3

8:00 P. M. Executive Committee Meeting.

WEDNESDAY, SEPTEMBER 4

10:00 A. M. Registration of Members and their Guests.

2:00 P. M. General Session:

1. Roll call and reading of minutes.
2. Welcoming Address—Hon. Henry L. Snyder of Allentown, Pennsylvania.
3. Response to Welcoming Address—E. A. Henry of Little Rock, Arkansas.
4. President's report.
5. Introduction of new members—David I. McAlister, Secretary.
6. Address—"Importance and Development of Insurance Law and Practice," by V. J. Skutt of Omaha, Nebraska, Chairman of the Insurance Section, American Bar Association.
7. Announcements:
   (a) Royce G. Rowe of Chicago, Illinois, Co-chairman of the Entertainment Committee.
   (b) Mrs. Pat H. Eager, Jr., of Jackson, Mississippi, Chairman of the Ladies General Entertainment Committee.
   (c) Mark Townsend of Jersey City, New Jersey, Chairman of the Golf Committee.
   (d) Mrs. Robert W. Shackleford of Tampa, Florida, Chairman of the Ladies Bridge Committee.
   (e) Mrs. Frank X. Cull of Cleveland, Ohio, Chairman of Ladies Golf Committee.
   (f) Wilson C. Jainsen of Hartford, Connecticut, Chairman of the Tennis Committee.
8. Announcement of personnel of Nominating Committee.
9. Adjournment until 9:30 A. M. Thursday.

6:30 P. M. President's Reception.

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ANNUAL CONVENTION—SEPTEMBER 4, 5, 6, 1946,
GALEN HALL, WERNERSVILLE, PA.

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THURSDAY, SEPTEMBER 5

9:30 A. M. General Session:

1. Call to order.
2. Report of Executive Committee by Past President, Pat H. Eager, Jr.
3. Report of Secretary, David I. McAlister.
4. Report of Treasurer, Robert M. Noll.
5. Report of Editor of the JOURNAL, Geo. W. Yancey.
6. Reports of Standing Committees.
7. Address—"The Home Office and the Trial Attorney," by Paul C. Sprinkle of Kansas City, Missouri.
8. Announcement:
   (a) Price H. Topping of New York, N. Y., Co-chairman of the Entertainment Committee.
   (b) Mrs. Pat H. Eager, Jr., of Jackson, Mississippi, Chairman of the Ladies General Entertainment Committee.
   (c) Regarding open forums.
9. Adjournment until 9:30 A. M. Friday.

2:00 P. M. Open Forums:

1. Aviation Insurance Law Committee—Stanley C. Morris of Charleston, W. Va., Chairman, presiding.

PROGRAM

(a) "The Trial of Aviation Accident Cases," by Forrest A. Betts of Los Angeles, California.

(b) "Aviation Insurance from the Buyer's Standpoint," by Hayes Dever of Washington, D. C.
Discussion Leader: Judge E. W. Sawyer of New York City.

(c) "A Review of Recent Aviation Decisions," by Charles S. Rhyne of Washington, D. C.
A round-table discussion of the foregoing subjects will be led by members of the Association, whose names later will be announced.

2. Practice and Procedure Committee—Wayne E. Stichter of Toledo, Ohio, Chairman, presiding.

PROGRAM

THE INTERNATIONAL ASSOCIATION OF INSURANCE COUNSEL
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(a) "Declaratory Judgments in Insurance Cases," by David J. Kadyk of Chicago, Illinois.
Discussion Leaders: Joe G. Sweet of San Francisco, Cal., Erwin W. Roemer of Chicago, Illinois.

(b) "Recovery Over," by William E. Knepper of Columbus, Ohio.
Discussion Leaders: Joseph H. Hinshaw of Chicago, Ill., H. Melvin Roberts of Cleveland, Ohio.

(c) "Third-Party Practice in Federal Court," by Clarence W. Heyl of Peoria, Illinois.
Discussion Leaders: William H. Freeman of Minneapolis, Minn.; Kenneth B. Hawkins of Chicago, Illinois.

6:30 P. M. Social Hour.

7:30 P. M. Banquet under direction of the General Entertainment Committee.

FRIDAY, SEPTEMBER 6

9:30 A. M. General Session:

1. Call to order.
2. Address—"Sleep as a Defense," by L. J. Carey of Detroit, Michigan.
3. Address—"The Need for a Public Conscience," by Harry W. Colmery of Topeka, Kansas.
4. Report of Memorial Committee—Elias Field of Boston, Massachusetts, Chairman.
5. Unfinished business.
6. New business.
7. Report of Entertainment and Prize Committees.
8. Report of Nominating Committee.
9. Election of officers.
10. Introduction of new President and presentation of gavel.
11. Assumption of gavel by new President and announcement of meeting of Executive Committee at 2:30 P. M.
12. Adjournment by new President.

NOTE: A considerable number of the men who attend the annual meeting will wear white or black dinner jackets to the president's reception, the social hour and the banquet. A good many, however, will use their suit case space for things they need more and will leave their tuxedos at home. Both groups will be well represented at the September meeting.

Committee Report on Facilities of Galen Hall

By David I. McAlister, *Secretary*
Washington, Pa.

YOUR Secretary, together with Price Topping, co-chairman of the Entertainment Committee and Mark Townsend, Jr., Chairman of the Golf Committee, met at Galen Hall on June 14th, 15th and 16th, and went over the entire plant from one end to the other. Mr. Topping's memorandum in regard to rail and bus transportation follows this report. The hotel bus and station wagons meet all trains on the Reading Railroad and buses in both directions to take guests to and from Galen Hall.

Attendance at the Convention: Approximately 100 to 200 can be accommodated beginning Monday night, September 2nd, after five p. m., and the balance will be accommodated on Tuesday, the day before the convention opens. The hotel has slightly over 300 rooms, including the cottages which have a total of 49 rooms, most of them double. There are some rooms with private bath and approximately one-third of the rooms have connecting baths. A convention of 150 people comes in on Saturday, September 7th, and those who wish to stay over at the convention rates can be adequately accommodated. During the convention it will facilitate matters if you are going alone to pick a congenial roommate so that there will not be any single occupancies of double rooms. This is advisable because of the fact that this will probably be the largest convention we have ever had. There were 450 reservations by Saturday, June 15th, and they are still coming in. From present appearances Galen Hall will have to reserve a nearby hotel for the overflow who will still take all meals at Galen Hall. Transportation to and from this overflow house will be furnished by Galen Hall buses, three station wagons and about five sedans available for guests' transportation in case you do not have your own car along.

Dining Room: American Plan, large menu, generally only two meats for dinner, four for lunch, one of which is chicken or other fowl; good selection of cold cut platters. Repeats on any and all items except entree. Regular dining hours: Breakfast 7 to 10; Continental breakfast in the bar 10 to 12; lunch 1 to 2:30 (may be advanced if so desired); dinner 7 to 8:30.

Refreshment Situation: State Rationing. *Only residents of Pennsylvania* can purchase at Pennsylvania State Liquor Stores. Hotel supply for numerous bars on main floor, ballroom, lounge, golf club, etc., is more than ample and adequate. No drinks sold anywhere on Sunday. A rather good five-piece orchestra plays in the dining room at meals and in the ballroom in the evening. It is available for any use at any time or any place we want in whole or in part, such as for the President's Reception. Under such circumstances, we would be expected to tip the orchestra members participating for extra services. No charge is made by the hotel.

Rooms: There are no private parlors except the living room in cottages which have a central living room. Practically all rooms will be set up as double rooms and no singles will be sold except some very small rooms sharing a bath with another large room. Some room furnishings are old-fashioned but most are modern and beds all have splendid new inner-spring mattresses.

Rates: $15 a day American Plan.

Golf Course: Within easy walking distance from the hotel there is a rather short course, 5,250 yards in length, with a par of 66. You will be good if you can make

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George W. Yancey, *Editor and Manager*
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The Journal welcomes contributions from members and friends, and publishes as many as space will permit. The articles published represent the opinions of the contributors only. Where Committee Reports have received official approval of the Executive Committee it will be so noted.

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par because there are 10 waterholes, including one "island green."

Luncheon may be served at the golf house, sandwiches or box lunch, by giving notice prior to eleven in the morning. Buffet lunch can probably be arranged for the day of the golf tournament if so desired at no extra cost.

Swimming Pool: About a mile from the hotel; easy drive, pleasant walk or the bus goes regularly. New bath houses at the swimming pool. Pool 125' by 375', stone face and natural bottom. There is no beach but a spacious sun lawn and plenty of chairs. Box lunch may be had here if notice is given before eleven o'clock.

The hotel has a glassed-in solarium pent house which could accommodate the ladies' bridge party or other similar function. A balcony about 8 feet wide extends all the way around it. Beautiful view and good fresh air and sunning facilities.

Adjoining the lobby is a large glassed-in porch suitable for bridge party except on very cold days as one end is open.

There are reading, writing and lounging rooms very tastefully furnished just off the main lobby.

There is a small news and tobacco shop at which a few standard proprietary drugs are sold such as Aspirin, shaving cream, tooth pastes, etc., and the gift department is rather inadequate for our needs. All committees intending to purchase prizes should procure them before coming to the hotel.

There is a barber shop, a beauty parlor, one-day laundry service, one-day cleaning service and one or two hour pressing service. The ballroom where the convention sessions will be held is equipped with a public address system. We inspected the kitchen, pantries, butcher shop, cold storage room for meat, poultry, eggs, butter and vegetables and found nothing lacking and the place immaculately clean. The service in the main dining room and cocktail bar is excellent; waitresses extremely helpful and polite and the food was the best hotel food that we have tasted since before the war. The chef, who has been at the hotel for twenty years, was formerly with a famous New York hotel.

Topping, Townsend and I unreservedly endorse the setting,, the scenery, the courteous service and the food, but we do feel perhaps we are going to be a little crowded due to the fact that this will probably be the largest attendance we have ever had at any convention. We had 383 members, wives and guests at Chicago in 1944 and you can realize our present situation with over 450 reservations more than two and a half months before the convention.

For those who desire to go to Washington, Pa., prior to our meeting, Mr. W. R. Lippencott, manager of the George Washington Hotel in Washington, Pa., has reserved twenty double rooms for occupancy Labor Day evening, September 2, 1946. If you wish one of these rooms on that night, you will have to write to Mr. Lippincott before August 15th, using either my name or the name of the Association or both. If such reservation is confirmed by letter direct by you, it will be held for you September 2nd until 8 p. m. Eastern Daylight Savings Time. It is 265 miles from Washington, Pa., to Galen Hall, just a short day's drive.

We sincerely trust that you will be with us to renew old acquaintances at the biggest convention we have ever had.

Transportation To Galen Hall

By Price Topping
New York City

GALEN HALL is four miles from Wernersville and ten miles from Reading. Both cities are served only by the Reading Railroad System, service into Wernersville being by both train and bus. The Reading is a short-line railroad from Philadelphia to Harrisburg, with branches north and south.

Those coming by train will always end up on the Reading, changing to other trains at either Philadelphia, Harrisburg, Easton, or Allentown. Those coming from the west and southwest will have to change trains at Harrisburg.

There are 4 trains a day out of Harrisburg—all times herein shown are Eastern

Daylight Saving Time. Trains leave Harrisburg for Wernersville at 4:25 a.m., 8:05 a. m., 4:40 p. m., and 5:15 p. m., getting to Wernersville about an hour and a half later. In addition, there are 8 buses run by the Reading Railroad from 5:44 a. m. to 10:18 p. m., which also take an hour and a half to get to Wernersville.

Those coming from Philadelphia and south and southeast will have to get Reading trains from Philadelphia. Trains and buses leave Philadelphia from the Reading Terminal at 12th and Market Streets. The trains require a change at Reading from one train to another. The train-bus combinations do not have connecting trains at Reading, but they may change to a connecting bus run by the railroad at the Reading station.

Trains leaving Philadelphia direct for Reading leave Philadelphia at 4 a. m., 10:40 a. m., 4:15 p. m., and 7 p. m., taking about two hours to Wernersville. Trains leaving Philadelphia for Reading and changing for a connecting bus for Wernersville leave at 7 a. m., 8:25 a. m., 1:30 p. m., 5:43 p. m., and 10 p. m., again taking about two hours.

Those coming from Buffalo, Rochester, and that vicinity take the Lehigh Valley Railroad to Allentown and there change to the Reading. Trains leave Allentown at 5:30 a. m., 11:26 a. m., 4:30 p. m., and 7:40 p. m., taking about an hour and 20 minutes to get to Wernersville. Buses leave Allentown for Wernersville at 7:05 a. m., 10:05 a. m., 1:50 p. m., 4:05 p. m., 6:25 p. m., and 10:15 p. m., taking about the same time as the train.

Those leaving New York City, New England, and northeastern New York can get Reading trains on the Central Railroad of New Jersey line leaving the Liberty Street Ferry Terminal, lower New York City, at the following times: Trains leave the Liberty Street Terminal in New York City at 8:52 a. m., 1:10 p. m., and 5 p. m., arriving in Wernersville approximately 4 hours later. In addition, there are a number of trains that go only to Reading. In that case, any taxi in Reading will take you to Galen Hall at a cost of $4. If that information proves incorrect at any time, phone Galen Hall and they will order the taxi at that rate. The hotel will meet all trains arriving at Wernersville from any direction by bus, supposedly without previous notice. It still would be wise to notify the hotel of contemplated time of arrival at the Wernersville station. The hotel charges 50c for transportation from Wernersville station to the hotel. On the Wernersville station at the eastern end there are a number of signs hanging overhead, marking the buses going to the various hotels in the community.

The Reading Railroad is cooperating with us very sincerely. Few of the trains above mentioned have Pullman accommodations. However, if a reasonable-sized party will get together and notify the railroad a month in advance, it will be able to put on what special equipment as is necessary. Generally, 25 people are necessary to reserve a chair car. Out of New York, the Reading people have suggested that they will run a Pullman car for 25 people at regular Pullman rates or a large observation coach car, reserved for our party, for 30 people, at coach rates. They have suggested that most people going from New York to Wernersville use the train leaving the Liberty Street Ferry Terminal at 5 p. m. If we will get a party of 35 people or more, they will run that special observation coach car and such additional cars as may be necessary, reserved for our exclusive use on that train. However, a month's notice of that is necessary. It is therefore suggested that all people traveling to the convention living in the New York area, New England, or eastern New York State area desiring to travel to Wernersville by train and leaving New York at 5 p. m. on Tuesday, September 3rd, immediately notify Price H. Topping, 50 Union Square, New York 3, N. Y., of their desires, giving the names of all in the party. It is contemplated that sufficient people will be interested in reserving this observation coach car at coach rates from New York to Wernersville. If the car is reserved, a full diner will be attached to the train instead of the usual combination diner and club car. An additional car may be necessary. Such notice to Mr. Topping should be given promptly, as a month's notice must be given to the railroad.

Those who contemplate going to Wernersville through Philadelphia—and that includes Philadelphia, South Jersey, and all of the south Atlantic states people—may have similar accommodations out of Philadelphia. It is suggested that those who

desire to go through Philadelphia and have a special car out of Philadelphia for Wernersville communicate with J. Harry LaBrum, Packard Building, Philadelphia, Pa., and so advise him of just what train they intend to take out of Philadelphia. If a party of 35 or more people can be assembled for any particular train, they will get a private car that will go direct to Wernersville from Philadelphia without the necessity of changing trains at Reading. It is contemplated that a special car can be added to all such trains but that it can probably best be added to the train leaving Philadelphia at 4:15 p. m. on Tuesday, September 3rd, arriving at Wernersville at 6:22 p. m., as it appears that most people will prefer that train. However, developments may show that there are sufficient people to merit special cars on other trains, and if so, Mr. LaBrum will make the arrangements. It would be equally well for all who are using the train to notify either Mr. LaBrum or Mr. Topping, as the case may be, of the contemplated time of departure from Wernersville so that return special cars may also be arranged to New York and Philadelphia. At this writing, we do not have the scheduled departures of outgoing trains from Wernersville, so if you will give a general suggestion as to what train you want to connect with in either Philadelphia or New York, or approximate time you want to leave Wernersville, that may be worked out in the near future.

It is again pointed out that all time hereinabove given is Eastern Daylight Saving Time.

For the benefit of those who are driving, the main auto roads are much the same as the above-mentioned rail routes. The driving time by the actual experience of the writer, from the George Washington Bridge to Wernersville, in the rain, was 4 1-2 hours. The distance is 145 miles. Philadelphia and Harrisburg are much shorter and easier. Garage facilities are maintained on the hotel grounds at 50c per night, the doorman handling parking and procuring the car for you. Many cars are left out in the open, at no charge.

Joint Adventure In Negligence Cases

By Robert Guinther
Akron, Ohio

"The now widely recognized legal concept of joint adventure is of modern origin. It has been said to be purely the creature of the American Courts. The early common law did not recognize the relationship of co-adventurers unless the elements of partnership were disclosed and proved, but it is now generally understood that two or more persons may, by combining their property or labor in a joint venture, create a status which, while having some or many of the characteristics of a partnership, is not identical therewith."

* * *

So runs the text of American Jurisprudence (30 Am. Jur. page 676). The new and modern legal concept described by the text-writer has, however, been recognized most frequently in cases involving business transactions and contracts made by joint adventurers with each other. Its recognition in negligence cases is a development of even more modern origin, particularly in cases where two or more persons are joined as defendants, and recovery depends upon whether they are joint adventurers.

The doctrine of joint adventure has been discussed by the courts of nearly every state, in literally hundreds of negligence cases, where the defendant has tried to prove that the plaintiff was engaged in a joint enterprise with him. The typical case is that of the passenger in an automobile, journeying with the owner and operator to a common destination and upon a common errand. The injured passenger (accident having occurred) sues the operator. The operator defends upon the ground that both parties were engaged in a joint adventure and insists that his (the operator's) negligence can, therefore, be imputed to his fellow adventurer, making him guilty of contributory negligence. Rather uniformly the courts have said that those

who are going to a common destination, for a common purpose, are not engaged in a joint adventure as to the vehicle operation, unless it is shown that the passengers have been more than mere riders and have had some control or right of control over the operation. The defense of contributory negligence is, accordingly, not established when it is shown merely that the operator and the passenger were engaged in a joint adventure.

Literally hundreds of cases in which the doctrine of joint adventure has been discussed fall into another classification. They are cases where one joint adventurer seeks to recover from a third party and an effort is made by the third party to impute to him the contributory negligence of a joint adventurer. The typical case is one where two motor vehicles have collided and the passenger in Automobile A sues the operator of Automobile B. The operator of Automobile B defends upon the ground the operator of Automobile A was guilty of negligence which contributed to the happening of the accident, and that his contributory negligence can properly be imputed to his passenger, because passenger and operator in Automobile A were engaged in a joint adventure. It is rather regularly declared that if a joint adventure is established between the two, the negligence of the operator of Automobile A can be imputed to his passenger, thereby defeating his right of recovery.

Cases of the kind described above need no discussion. Everyone has had close acquaintance with them.

We propose, instead, to discuss the more unusual case—that is, the case where a third person sues two or more defendants, charging that they are jointly liable for injuries received by the plaintiff in a motor vehicle accident when the motor vehicle was, at the moment, operated by or for only one of the defendants.

The thousands of cases in the books in which the term "joint adventure" has been discussed can be properly divided into five major classifications, as follows:

(1) Actions by one participant in the adventure against the other for damages for breach of the contract of joint adventure.

(2) Actions by a third person against two or more joint adventurers for damages arising out of contract.

(3) Actions by one adventurer against the other arising out of negligent conduct of one of them.

(4) Actions by one joint adventurer against a third person because of the negligence of a third person combined with claimed negligent conduct of one of the adventurers.

(5) Actions by a third person against two or more joint adventurers because of the negligent conduct of one of them.

It is obvious that the last class is the only one to be treated in this article. Whatever may have been said by Courts concerning the contractual liability of joint adventurers to each other, or to third persons, will be of no help here. Contract cases are of little value except as showing the extent to which the modern doctrine of joint adventure has been developed.

Likewise, suits of one joint adventurer against the other for his negligence may readily be ruled out.

Review of the vast multitude of cases which discuss the rule applicable where members of a group are riding in an automobile and journeying on a common errand to a common destination, or where the owner of the motor vehicle has been riding in it, but without participating in the driving, would produce no useful result.

The fifth class above is the only one which we desire to discuss. Case law dealing with such situations will, accordingly, be helpful. We have, therefore, ruled out reference to, and discussion of, any case law except that found in cases where an injured third person has sued two or more defendants, charging that they were engaged in a joint adventure, and that all were responsible for the negligent act of any one.

COMMON CONCEPT OF JOINT ADVENTUURE

Joint adventure has been variously defined. The language into which the definition has been cast is of less importance than the concept conveyed by the term. Probably a fairly universal definition would take shape as follows:

"A joint adventure is a special combination of natural or artificial persons who, without creating a partnership,

combine their money, property or time, or all of them, in the conduct of some particular line of trade or some particular deal for profit."

Persons who are joint adventurers have, obviously, a very different relationship than persons who are partners. Joint adventure is a *special combination* for a *particular deal*. Even though the persons combine their money, property or time for a particular deal, no joint adventure relationship arises unless they do so *for profit*. Combinations for pleasure fall outside the concept.

MUTUAL AGENCY IS A CONSEQUENCE OF THE RELATIONSHIP. IT DOES NOT CREATE THE RELATIONSHIP

The law of partnership tells us that when the relation of partnership has been established, each partner is made the agent of the other as to all transactions falling within the scope of the partnership. If there is a partnership, there is mutual agency. The mutual agency flows from the relation of partnership as a necessary consequence. Mutual agency does not create a partnership. A partnership does, however, create mutual agency.

Similarly, mutual agency between joint adventurers follows or flows from the relationship of joint adventurers. Joint adventure has many of the elements of partnership, and is closely similar to partnership. When a joint adventure has been established by showing a special combination of property or time for profit, then each of the joint adventurers is, in consequence, the agent of the other. A joint adventure is not created by showing mutual agency. Mutual agency is created by showing a joint adventure.

Many of the *contract* cases as to joint adventure have discussions of pieces of evidence which show that the parties have agreed that each shall be the agent of the other, and such agreements are treated as evidence tending to establish the relationship. Such evidence is certainly persuasive when the question as to whether the relation exists is in issue. It is of no importance whatever when other evidence has established the relationship. The agency of each for the other follows as a necessary consequence from the relationship.

Similarly, in negligence cases, an agreement in advance as to mutual agency will be helpful in proving the relationship as joint adventurers. Such an agreement is, however, not essential, or an absolute *sina qua non*. If the relationship can be established from other facts, then no evidence as to mutual agency is necessary, for the agency of each for the other follows as a necessary consequence of the relationship.

HOW CAN THE RELATIONSHIP BE PROVED?

The relationship as joint adventurers must be established by evidence, just as it must be when the question of partnership is in issue. In *contract* cases involving joint adventure there are usually papers and documents. In negligence cases such papers and documents are seldom found.

How then can the relationship be proved? The question can best be answered by showing facts from which Courts, in different jurisdictions, have reached the conclusion that the relationship has been established, and have awarded judgment against *all*, even though only one of the joint adventurers had performed the negligent acts which produced the injury to the plaintiff.

One of the interesting cases showing the modern development of the joint adventure doctrine is *Martin v. Weaver*, 161. S.W. (2d) 812 (Tex., 1941).

The plaintiff's wife had been injured while riding as a pasesnger in a taxicab. One Martin owned the cab and had turned it over to one Cruger to drive. Cruger and Martin divided the earnings from the cab. But the suit was against Martin and the 94 Transportation Company, and charged that they were "engaged as joint adventurers in a common enterprise" (p. 815). The Company insisted that it had nothing to do with the driving of the taxis. It leased small pieces of land in the City of El Paso, and maintained telephones on them. It permitted Martin, and other owners of taxis to stand their cars on the lots. When a telephone call came the first car in line responded to the call. The Company got nothing out of the earnings of the taxi in carrying the passenger. Each taxi owner paid one dollar per day to the Company. Martin and all other taxicab owners put signs on the cars identifying them as "94 Taxi." Objections were made that the action could not be maintained jointly against Martin and the Company. The

Company said that Cruger was Martin's man, not its. Martin said that Cruger was the Company's man, not his, because Cruger had, in fact, been selected by the Company. The Court said (p. 816):

> "The relationship between the Company and Martin is only important here insofar as it affects the relationship of Martin and the driver. However, we believe the *Company and Martin were engaged in a joint adventure.* This venture was the transportation of passengers for hire."

And in *Champ v. Atkins,* 128 Fed. (2d) 601—(U.S.C.C.A. for District of Columbia, 1942)—a similar situation was presented. Persons who owned cabs paid one dollar a week to the Harlem Taxicab Association. They used common telephone service and other common service and facilities. All the cabs had the same color. The cab which did the injury was operated by one Murchison. Champ, the injured man, sued the several members of the Association "and recovered judgment against them on the theory that *they were engaged in a joint enterprise*" (p. 602). The United States Circuit Court of Appeals approved the judgment and visited upon the joint adventurers the penalty that their licenses were suspended until the judgment was paid.

In *United Transportation Company v. Jeffries,* 5 N.E. (2d) 524 (Ind., 1937), the plaintiff had been injured while riding in a taxicab owned by the defendant Cook. She sued Cook and the Transportation Company jointly. Cook paid the Company $23 a month for station and telephone service: the name of the company was painted on his (Cook's) taxi: he bought his own license and paid all his operating expenses. Cook employed and paid another person to drive the cab. The jury returned a verdict in favor of Cook and against the Company. The judgment against the Company was reversed because, as said in the syllabus—

> "Verdict exonerating owner of taxicab from negligence for injuries sustained by passenger in collision which occurred when owner's servant was driving cab precluded recovery against *taxicab company which was engaged with owner in JOINT ENTERPRISE of operating such cab.*"

And, if it be urged that such results were proper where the injured party is a passenger in the taxi, but not otherwise, we direct attention to *Association of Independent Taxi Operators v. Kern,* 13 Atl. (2d) 374, (Maryland, 1940), 131 A.L.R. 792, where the plaintiff was a pedestrian injured by a taxicab. He was awarded judgment in his suit against the Association — a co-operative effort on the part of the different cab owners.

In *P&S Taxi and Baggage Company v. Cameron,* 80 P. (2d) 618 (Okla., 1938), a pedestrian was struck by a taxi. Its owner operated it under an arrangement made with the company, paying it $1.40 per day for telephone and station service. The plaintiff maintained a joint suit against operator and company and prevailed. The Court said (p. 622):

> "As in the case of Callas v. Independent Taxi Owners Association, Inc. et al, 66 Fed. (2d) 192, counsel for defendants argue that there is no evidence that Endicott, the driver of the cab, was a servant, agent or employee of the defendant, P&S Taxi and Baggage Company. Here, as there, the cab was being operated under the name and sign of the defendant company, and was *legally presumed to be under the control of the company whose name it bore.* At least *the evidence shows a* sort of *joint adventure or joint enterprise,* and therefore sufficient to establish a prima facie case of agency and presents question of fact for the jury rather than one of law for the Court."

Nor are taxicab cases the only ones which may be drawn upon as illustrations of joint adventure.

In *Kieswetter v. Rubinstein,* 48 A.L.R. 1049 (Mich.), the plaintiff sued one Hammel jointly with Rubinstein. Hammel owned several lots and made an agreement with Rubinstein to build small houses on them. Hammel was to furnish the credit and Rubinstein to purchase the materials, and get the work done. They fixed sale prices for the completed houses and were to divide the amount received above a figure determined as "cost." The plaintiff, a plumber, was working on one of the houses

when he was injured as a result of negligence in not putting up sufficient braces in the building while under construction. Hammel urged that Rubinstein was an independent contractor and that the negligence of Rubinstein in not furnishing sufficient braces could not be charged against him, Hammel. The Court permitted the suit to be maintained against Hammel and Rubinstein jointly.

It found that they were not partners, but said (p. 1054):

> "It is clearly and conclusively shown here that these defendants intentionally associated themselves together in a written contract for the express purpose of a *joint adventure*, or single business enterprise for profit, one contributing his time and skill, the other the property and money to carry it out. * * By the same token it is claimed Rubinstein was in sole control of the construction, Hammel was in sole control of their accounts and the money essential to finance the enterprise, of which he never let Rubinstein handle a dollar, except his weekly stipend; but whatever either was exclusively authorized to do under their agreement, or did, each was acting for both in furtherance of their joint adventure, or enterprise for their mutual profit."

And in *Cunningham v. Stuckey*, 58 P. (2d) 42–(Kan., 1936), two persons were jointly made defendants. They were father-in-law and son-in-law. The older owned a farm which the younger farmed on a co-op-share basis, using some of the father-in-law's tools. A plow was needed. The two went together with a truck and trailer owned by the son-in-law. The father-in-law bought the plow, and they loaded it on the truck and trailer. Part of it stuck out over the trailer and a highway accident caused injury to the plaintiff. The son-in-law had been driving, but had left the outfit standing with the father-in-law remaining with it. A verdict against both was approved, even though the defendant father-in-law contended that there "is no evidence of joint ownership, or joint control, or joint enterprise." The Court said (p. 44):

> "the point is not well taken, and the question concerning Stuckey's liability was a fair question to submit to the jury under the evidence. The evidence disclosed that defendants live together in the same house, operate the same farm under some arrangement, modified in some respects from time to time: that they were both desirous of having this plow to use on the farm," etc.

The case of *Larson v. Lewis-Simas-Jones Company*, 84 P. (2d) 296–(Cal., 1938), is interesting. The defendant company owned a boat which was chartered by a group of fishermen. The company was to sell the catch and receive a portion of the proceeds. The plaintiff was injured while on the voyage and sought compensation as against the boat-owning company under the provisions of a Federal Maritime Act awarding compensation to employees. The Court said that no compensation was payable because no employer-employee relationship existed. It said this after stating: "Inquiry will first be directed to determining whether respondent's relationship was that of employee, or a party to a *joint* enterprise or *adventure*."

OHIO CASE LAW IN NEGLIGENCE CASES

In many, if not most states, the rules as to joinder of defendants permit joinder of both master and servant even though the negligent conduct complained of is only that of the servant. In Ohio a different rule as to joinder of defendants prevails.

Ohio courts have consistently held that master and servant cannot be joined as defendants where the acts of negligence have been performed by the servant. The Ohio courts say that the servant is primarily liable and the master is only secondarily liable, by reason of the doctrine of respondeat superior. Joinder of defendants is permitted in Ohio only if all the defendants fall within the same classification: usually only if they are all primarily liable. Joinder is denied where the liability of one defendant is primary and that of the other is secondary.

Probably because of such limitations upon the right of joinder of defendants in Ohio, joint adventure negligence cases are found more frequently in Ohio than in other jurisdictions and the doctrine has evolvd more fully in Ohio than in many other states.

The question of whether the owner-oper-

ator of a truck who hauled goods for a motor transportation company was an independent contractor such that the company was not responsible for his negligence was presented to the Supreme Court of Ohio in *Leonard v. Kreider,* 128 O.S. 267. Although the truck owner furnished all his own gasoline, oil and tires, chose his own route, and could come and go as he pleased, the Court said that no conclusion could be reached, as a matter of law, that he was an independent contractor, and that the matter must be left to a jury, particularly where the sign of the transportation company was on the truck, and the driver had a card identifying him with the transportation company. When that case was retried, it came a second time before the Court of Appeals of Summit County, Ohio, which declared that the truck owner and the transportation company were "joint adventurers." Its opinion is found in 51 O. App. 474 (1935). The Court of Appeals said (p. 477):

> "the evidence disclosed by this record manifests a relationship more in the nature of a *joint adventure* between Hixson and defendant than it does a relationship of independent contractor. Defendant was to solicit the haulage, obtain contracts, do the necessary billing and bookkeeping, collect and disburse the money arising from said hauling, and Hixson was to furnish his truck and driver, as well as gas, oil, tires and repairs, go when and where he was told, and carry such goods as defendant might designate, using his discretion and judgment as to highways to be used en route, but being required to register in a book furnished by defendant and kept at a gasoline station in Ripley, N. Y. The proceeds arising from the hauling of said freight were to be divided 15 per cent to defendant and 85 per cent to Hixson, with a deduction made for cargo insurance of 3 or 4 per cent of the gross amount received. If the compensation for the haulage was not collected, neither defendant nor Hixson received anything, and the defendant did not agree to pay Hixson for such hauling."

The same Court of Appeals spoke again concerning a truck owner and a motor transportation company in *Wenzlanski d.b.a. Akron-Kansas City Motor Freight Company v. Allen,* 51 O. App. 482 (1936). The question of whether the owner and the company could be sued jointly was squarely raised. The Motor Freight Company (relying on *Clark v. Frye,* 8 O.S. 538 and *French, Admr. v. Central Construction Co.,* 76 O.S. 509), asserted that a joint action was improper. The claim was rejected. The Court said (p. 488):

> "We hold that, in the transaction in question, the relationship between Grolbert and Wenzlanski was not that of master and servant, nor of principal and agent, but was that of *joint adventurer.*"

The Court distinguished the case before it from those where the occupants of an automobile were journeying on a common mission, for pleasure, not business. In those cases it has been rather regularly held that no one is responsible for the negligence of the other unless all "have an equal right to direct and govern the movements and conduct of each other with respect thereto." The Court said that where the parties were engaged in "business" and each wanted to make money, a different rule applied, and each was responsible for the acts of the other.

In *Bierla v. Hochenedel,* 25 O. App. 186, each of several bus owners furnished a bus, paid for his own driver, and upkeep. They pooled the earnings and divided them. The association was declared to be a *"joint adventure."*

In *Mavromates v. Huchinson,* 43 O. App. 365, one Thanos operated an automobile owned by Mavromates. The plaintiff sued Mavromates when injured as a result of the negligence of Thanos. Mavromates had entrusted his automobile to Thanos to go to "Columbus to see about a restaurant or the purchase of a restaurant in which they were mutually interested." The Court said:

> "We believe this would be considered * * * a *joint adventure* * *. Thanos, the operator of the car, was acting upon the business of the defendant, Mavromates, and also upon his own business, and the allegation in the petition charges that at the time of the accident the car was being operated on the joint business of both."

A RECENT OIL COMPANY CASE

In late 1944, the Supreme Court of Ohio announced a decision in the case of *Bennett v. Sinclair Refining Company*, reported in 144 Ohio *State Reports*, page 139. The facts out of which the litigation grew were unusual and are summarized as follows:

Sinclair refines and sells gasoline and petroleum products. It had a bulk distributing station in an Ohio city and desired to distribute its products among farmers in the area. A man by the name of Varnes owned a motor truck, had a line of customers for gasoline, and was willing to sell Sinclair products. Sinclair shipped a large gasoline tank from Chicago to the Ohio town for the express purpose of having it put on the truck chassis owned by Varnes. Varnes paid nothing for the tank and received it upon condition that he "was to use that tank as long as I sold Sinclair products." He mounted Sinclair's tank on his (Varnes') chassis. Sinclair furnished delcalcomania signs which Varnes put on the sides of the combination of truck chassis and tank. Sinclair furnished porcelain emblems which Varnes put on the rear of the tank. The emblems were the familiar Mastodon which Sinclair uses as its trade mark. Cans and receptacles on the truck were marked with Sinclair's name. Externally, at least, the outfit looked as though it belonged to Sinclair.

Each day Varnes secured one or more tank loads of gas at Sinclair's bulk filling station and secured other Sinclair products. He had a "route" in farm territory and supplied his customers and a few filling stations with Sinclair products. For every gallon of gasoline sold to his customers, Varnes received 1¼ cents and received a percentage of the selling price of the other petroleum products. Varnes collected from his customers the whole of the selling price of the gasoline and other products and turned over the gross selling price to the Sinclair office. The whole amount was deposited in Sinclair's bank account. Twice a month Sinclair's manager gave Varnes a check representing the amount due to him at 1¼c per gallon for the number of gallons sold and the proper percentage of other products sold.

Varnes provided all fuel, tires, repairs, and all other things necessary to keep his truck going. He furnished a driver for the truck and paid the driver. In dealing with customers, he gave them a receipt which was furnished by Sinclair and which had on it a statement "Received payment for Sinclair Refining Company."

The plaintiff in the action joined Varnes and Sinclair as defendants, claiming that they were engaged in a joint adventure. Sinclair insisted that the facts demonstrated that Varnes was an "independent contractor," free to go when and where he pleased in serving his own customers. It asserted that it paid Varnes for hauling and selling the gasoline at a fixed rate per gallon but that it retained no right of control over Varnes.

A collision occurred while the combined truck and tank outfit was being operated by a person who had been selected by Varnes. Sinclair denied, in substance, that the relationship of master and servant existed between it and Varnes and, to repeat, asserted that Varnes was an independent contractor.

The plaintiff relied upon the establishment of the relationship of joint adventure for her claim that the two defendants were properly joined.

The Supreme Court of Ohio declared that the question of whether Sinclair and Varnes were engaged in a joint adventure was one which was properly submitted to a jury, and the jury having found in favor of the injured third party, the conclusion was that both defendants were responsible for the substantial injuries received by the plaintiff. The Court said that it was apparent that both Sinclair and Varnes were interested in making a profit from the transactions which were carried on and went on to say:

> "We think that from the evidence, reasonable minds might well have concluded that Sinclair and Varnes did combine their property, money and time in the conduct of distributing petroleum products; that each participated in the profits and losses: and that there was no actual partnership or corporate designation. The jury having concluded that the appellants were engaged in a joint adventure, we are not prepared to say that such conclusion is contrary to law."

A FUTURE LOOK

The doctrine of joint adventure is, as the textwriter quoted at the beginnig of this article has said, "of modern origin." The doctrine has been greatly expanded in the field of negligence cases. It can be expected that it will continue to expand. Persons who combine their property or money and time in any sort of deal from which they expect to make a profit can reasonably expect that they will be charged with the consequence of the negligence of anyone who is employed in helping to make the profit. A wide door is open for claims against persons who have not suspected that they were responsible for negligent conduct by individuals in whose selection they have had no voice.

It is probably only fair and just that the doctrine should be expanded in the field of negligence. Its continued expansion will, however, put upon all persons who are likely to engage in transactions having any resemblance to the sets of facts which have been set forth herein, the responsibility of securing protection against negligent acts which may be performed while the enterprise is under way. The protection can, of course, be secured through public liability insurance.

Insurers, in turn, will have to estimate the increased risk which may fall upon them if their insureds are found to have been engaged with some other person in a joint adventure.

The doctrine of joint adventure is relatively new. Eyes must be kept open and counsel for both plaintiffs and defendants must be alert to note the expansion of the doctrine in the field of negligence cases.

Some Observations Concerning Statutes Denying to Insurers Defenses Contained in Unattached Applications For Life Insurance

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I. IN GENERAL

UPON first impression it would seem that the problem at hand should be considered separately for each state in the Union. However, the basic similarity of statutes, which deny defenses to insurers because of failure to attach copies of applications and related documents to life insurance policies, is such that certain characteristic doctrines have developed which are common to a consideration of the problem in almost any jurisdiction.

Notable among such general pronouncements is the rule that if a copy of the application is not attached to the policy, the application cannot be considered a part thereof, (except in situations where the application itself was oral[1]) nor may the insurer rely upon any defense arising out of the making of the application[2] or more particularly, the insurer is barred from introducing such application or related documents in evidence.[3]

This article is directed to an examination of the decisions with a view toward suggesting certain limitations upon their general application.

At the outset let it be stated that the type of statute under consideration does not usually apply to policies issued by *bona fide* benevolent associations,[4] nor does it apply, without specific statutory cover-

[1] *Western Fidelity National Insurance Company v. Burton*, 287 U.S. 97, 77 L. Ed. 196, 53 S. Ct. 26, 87 A.L.R. 191 (1932).

[2] *Appleman, Insurance Law and Practice*, Vol. 13, p. 304, §7571, note 2, (1943), citing many cases from most jurisdictions.

[3] *29 Am. Jour.* 188 §169, note 7 (1940), citing cases and listing several pertinent L.R.A. and A.L.R. annotations. *Couch, Cyclopedia of Insurance Law*, Vol. 1, p. 274, §138, note 5 (1929 plus 1937 supplement), listing specific statutes and cases construing same.

[4] *Attorney General and Colonial Life Association*, 194 Mass. 527, 80 N.E. 455 (1907), statute requiring attachment of copy of application to policy not applicable to applications for contracts with a benevolent association. *Gilligan v. Royal Arcanum*, 5 O.C.C. (N.S.) 471, (1904) Ohio General Code §9389, requiring attachment of copy of application does not apply as Royal Arcanum is a fraternal order and is controlled by Ohio General Code §9462, et seq.

age, to applications for group insurance.[5]

That the courts have been reluctant to construe such statutes, in the absence of a positive mandate, as arbitrarily denying the insurer the defense of fraud, is indicated by the separate body of law which has developed distinguishing between situations involving false representations or warranties in an insured's application, and situations involving fraudulent procurement or inducement.[6]

Two further specific limitations on this type of statutory requirement are as follows: (1) Where the policy on its face contains the express condition that the insured shall be in sound health on the effective date of such policy, the insurer is not barred from asserting facts going to the health of the insured on the date of delivery, even though a copy of the application was not attached in accordance with statute, and even though the matter brought out on the issue of sound health on a specific date might include contradictions of answers to questions contained in the unattached application.[7] (2) Where statements, representations, warranties or conditions in an unattached application are also contained in the policy itself, the insurer can, by the preponderant weight of authority, rely upon the policy provisions in spite of statutes denying reliance on matter contained in unattached applications.[8]

II. PRACTICE AND PROCEDURE

By way of specific example, the history and development of the law in the State of Ohio will be considered. The applicable section of the Ohio General Code (Sec. 9389), is generally recognized as one of the most restrictive statutes in the country.[9]

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[5] *Continental Assurance Co. v. Henson*, 297 Ky. 764, 181 S.W. 2d 431, (1944), wherein Kentucky court construed Illinois statute.

[6] *93 A.L.R. 374*, false representations in an application cannot be relied upon in the face of a statutory requirement that the application be made a part of the contract of insurance, or that the policy contain the whole contract, when the statute is not complied with (citing many cases from U.S., Ala., D.C., Ga., Ia., Ky., La., Mass., Minn., Miss., Mo., N.Y., Ohio, Okla., Pa., Tenn., Tex., W. Va. and Wis.), but with respect to fraud there is a conflict of authority with the more general accepted rule being that, although the application is not admissible in evidence as part of the contract if the statute has not been complied with, the application may be utilized to prove fraud or fraudulent procurement (citing cases from U.S., Ala., Ga., Ky., La., Mass., Minn., N.J., Okla., Pa., Tenn. and W. Va.). Further cases illustrating the proposition that even fraud constitutes no defense where the statutory requirements have not been satisfied, are collected as representing a minority rule in U.S., Ia., Ky., La., Mass., Mich., Minn., Miss., N.Y., Ohio, Okla., Pa. and Texas. The fact that some states are listed as supporting both the so-called majority and minority rules is resolved upon consideration of the specific statutes involved (93 A.L.R. 382, et seq.) and is too broad a subject for consideration in this article. See also *Appleman, Insurance Law and Practice*, Vol. 13, p. 308, §7571, note 11 (1943); *Couch, Cyclopedia of Insurance Law*, Vol. 1, p. 284, §140, note 18 (1929, plus 1937 supplement). Couch collects cases in which the statutory doctrine of inadmissibility when application is not attached is announced as applying only to applications which are referred to in the policy as containing part of the contract. *29 Amer. Jur.* 192, §173, note 1, although an application is not admissible in evidence as part of the contract if the statute has not been complied with, yet it may be competent evidence on the issue of fraud, or to show false representations inducing the issuance of the policy—that is, fraudulent procurement, citing *Prudential Insurance Company v. Niland*, 111 N.J. Eq. 347, 162 A. 605, 93 A.L.R. 369 (1932).

[7] *Appleman, Insurance Law and Practice*, Vol. 13, p. 309, note 18 (1943); *National Life and Accident Insurance Co. v. Green*, 2 So. 2d, 838, 191 Miss. 581, suggestion of error overruled, 191 Miss. 581, 3 So. (2d) 812, 136 A.L.R. 1510 (1941) held question of good health of insured on effective date of policy was question of fact, a condition precedent to liability of insurer, entirely separate from the consideration of the truth or falsity, of answers contained in an unattached application. *Metropolitan Life Insurance Co. v. Howle*, 62 Oh. St. 204, 56 N.E. 908 (1900) same case on rehearing 68 Oh. St. 614, 68 N.E. 4 (1903); *Lamarand v. National Life and Accident Co.*, 58 Oh. App. 415, 16 N.E. (2d) 701 (1937) all construing Ohio General Code §9389 (non attachment of application bars a defense on the ground of misrepresentation, but does not preclude insurer's right to have jury instructed unconditionally to find for the company in case they find the insured was not in sound health at the date of the policy).

[8] *87 A.L.R. 194 Annotation*, citing cases from U.S., Ia., Ky., Miss., N.C., Pa. and Wash. (contra, however, Wis.) and 93 A.L.R. 380, citing cases from U.S., Ia., Ky., Miss., Mo., N.Y. and Wash. (contra, however, Wis. and Okla.). For example *Metropolitan Life Insurance Company v. Scott*, 160 Miss. 537, 134 So. 159 (1931) Miss. Code 1930 §5174, which precludes denial of any matter contained in the application if it is not attached to the policy, but does not preclude reliance upon false matter contained in the policy itself, although the effect be to show the falsity of matter contained in the unattached application.

[9] *Insurance Counsel Journal, October 1937*, Calvin Wells III, "Do Statutory Provisions as to Copy of Application for Insurance Being Furnished Applicant Apply to Application for Reinstatement?"

Ohio General Code Sec. 9389:

"Every company doing business in this state shall return with, and as part of *any* policy issued by it, to *any* person taking such policy, *a full and complete* copy of *each* application or other document held by it, which is intended in *any* manner to affect the force or validity of such policy. A company which neglects so to do, so long as it is in default for such copy, shall be estopped from denying the truth of any such application or other document. In case such company neglects for thirty days after demand made therefor, to furnish such copies, it shall be *forever* barred from setting up as a defense to any suit on the policy, *any* incorrectness or want of truth of such application or other document." (Italics supplied).

This statute was enacted May 5, 1877, and bore the following descriptive title: "For the better protection of policyholders in life insurance companies."[10] It is hoped that a consideration of the decisions under this statute may be of assistance in other jurisdictions as representing limitations which are applicable to the more restrictive type of statutes, and, hence applicable *a fortiori* in states with less stringent regulations.

Andrews v. National Life Insurance Co., 7 Ohio N.P. 322, 7 Oh. D. 307, (1897) is a verbose Common Pleas decision which enunciated the rule that no distinction would be made in Ohio between mere misrepresentations and fraud in the procurement, saying, if the company– (page 323):

". . . had furnished these copies, they would have the right to show that these answers were wilfully false and fraudulently made; they would then have been a part of the contract just as much as the policy.

" * * * under the statute, I must hold that these two applications are entirely out of the case; that they are no part of the contract; that the contract here is the policy alone and that so far as the applications are concerned they are as though they had never been made . . ."

The *Andrews* case also held that an agreement contained in the application for insurance, wherein the applicant agreed that he would not practice any vicious or bad habit was not an independent provision of the contract, but constituted part of the application, and hence reliance on the provisions was precluded when a copy of the application was not returned to the insured as part of his contract.

It has been indicated that the restrictive Ohio statute does not apply to benevolent associations or fraternal orders,[11] and that insurers are entitled to rely upon a "delivery in sound health" clause contained in the body of the policy, whether a copy of the application is attached or not,[12] and this is so even if the clause in the policy contained the same language as that employed in the unattached application, thereby, in effect, allowing the insurer specifically to rely upon the facts misrepresented in an unattached application.[13] Procedurally, the court in *Metropolitan Life Insurance Company v. Howle, supra,* note 7, pointed out that where an application had not been attached in compliance with the statute, the proper means to put in issue insurer's allegation that the application contained answers, wilfully false and fraudulently made, was by confession and avoidance on the ground of non-compliance with the statute, rather than by general denial.

Another decision which illustrates one of the problems encountered in connection with the failure to return a copy of the application, is *Western and Southern Life Insurance Company v. Bennett,* 45 Oh. App. 498 (1933)[14] wherein a beneficiary resisted the admission of an unattached application. In the words of the court– (page 502):

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[10] *Laws of Ohio 1877,* p. 181.

[11] See note 4, *Gilligan v. Royal Arcanum,* 5 O.C.C. (N.S.) 471, (1904).

[12] See note 7, *Metropolitan Life Insurance Co. v. Howle,* 68 Oh. St. 614, 68 N.E. 4 (1903); *McReynolds and Washington National Insurance Co.,* 27 Ohio Abs. 316, (1938); *Western and Southern Life Insurance Company v. Bennett,* 45 Oh. App. 498 (1933) reinstatement application not attached, company may rely on "delivery in good health" clause in policy unless company specifically waived such provision; *Lamarand v. National Life and Accident Insurance Co.,* 58 Oh. App. 415 (1937).

[13] *Campbell v. Monumental Life Insurance Company,* 31 Ohio Abs. 420, 34 N.E. (2d) 268 (1940). (Court of Appeals).

[14] See Note 12.

"She had the statutory right to resist the introduction of this application (unattached) so far as the defendant might use it in defense. Appearing, however, for equitable relief in a case where she had the burden, she had no right to ask that an inference favorable to her (that insured was in sound health upon date of reinstatement) be drawn from the absence of testimony by suppressing the very testimony that would have made such inference impossible."

In *Campbell v. Monumental Life Insurance Co., supra,*[25] the court explored insurer's contention that testimony, otherwise inadmissible because within the physician-patient privileged communication statute, became admissible under a specific waiver of such privilege contained in an unattached application, and found that since the unattached application was not part of the policy, the insurer "did not have the right to use the waiver to support the admissibility of Dr. Coletta."

a. FULL AND COMPLETE APPLICATION REQUIRED

The Ohio statute refers to the requirement that a "full and complete copy" of each application shall be returned. In *Ohio Mutual Life Insurance Co. v. Hoffman,* 13 O.C.C. (N.S.) 127, aff'd. without opinion 83 Oh. St. 477, 94 N.E. 1112 (1910) it was held there was no error in excluding certain evidence and in directing a verdict for the plaintiff where it appeared certain omissions and inaccuracies as to questions and answers going to the medical history of applicant's paternal antecedents, and statements as to recent changes in applicant's weight, were omitted in the copy of the application returned to insured. In evaluating these omissions and inaccuracies the court observed—at page 128:

"These are all matters of substance, not only because the company has made them so by propounding the questions to the applicant and to the examining physician but because the family history, the physical condition of the insured and examination by the physician are generally regarded as important by insurance companies."

[25]See Note 13.

The above decision, of course, leaves open the general question as to what omissions and inaccuracies in an attached application would not be deemed material. (See section on full and complete copy infra page 25). It should be noted parenthetically that the type of document under consideration in the *Hoffman* case – even though entitled: "Report of Examining Physician"—is an entirely different type of document from those caled "Examiner's Reports," copies of which latter documents do not have to be returned to the applicant as a part of his contract, as we shall see in a subsequent section of this article.

Freedom Casket Company v. New York Life Insurance Company, (C.C.A. 3), 88 Fed. 2d 833, (1937), arose in Pennsylvania but it was held that Ohio law was controlling, and that the report of the examining physician, even though attached to the policy in conformity with the Ohio Statute above quoted, was inadmissible because the attached photostatic copy bore the endorsement of the medical examiner to the effect "see notes" under a question and answer dealing with the fact insured had undergone surgical treatment for a fractured skull in 1915. The "notes" referred to were not incorporated in the copy returned to the applicant.

The court decided that since the application showed on its face that it was incomplete, it fell within the bar of the restrictive statute and therefore the insurer was denied the defense of fraud or misrepresentation as to material contained in the application.

As the Ohio cases now stand, insurers are required to return substantially accurate and complete copies of any documents falling within the definition of an application. For a discussion of the definition of "application" as applied to insurane policies, see Section c infra.

b. LATE DELIVERY OF APPLICATION

Another group of cases under the Ohio statute considers the question of late delivery of a copy of an application not attached at date of issuance, and whether subsequent delivery at any time other than simultaneously with delivery of the policy, can be considered to have cured the defect.

Ten years after the statute in question was enacted, *Dickmeier v. Prudential In-*

surance Company, 4 Ohio N.P. 13 (1897) was decided. Here the able trial judge decided what should have been the leading case in Ohio on the question of the time of delivery of a copy of the application. In short, where a copy of the application was delivered to counsel for insured after the latter's death it was held that, at page 14:

> ". . . the copies referred to in Section 3621 (now Gen. Code §9389) must be delivered to the insured in his lifetime, the object being to enable him to examine them, and if mistakes are found, to have them corrected."

No possible objection could be raised to the above decision, yet the state of the law of Ohio on this question is currently clouded—witness the following opinions:

Mutual Life Insurance Co. v. Svonavec, 32 Oh. App. 195 (1929), involved a situation where insurer did not deliver a copy of the application until after the death of insured. Although it was only necessary for the court to hold that delivery after death did not satisfy the statute on the authority of the *Dickmeier* case, instead the decision is much broader as it states, at page 197:

> ". . . In our opinion the language of the statute contemplated a return of the application *simultaneously* with the delivery of the policy itself." (Italics supplied).

It may be noted that in the *Svonavec* case the company attempted to rely upon the "sound health on delivery" clause in the policy and that such defense was disallowed despite ample proof that applicant was not in good health on the effective date of the policy. The court reconciled its position on that point by relying on the fact that there was evidence that insurer's agent was told that insured was tubercular and hence held, in effect, that insurer had waived the "sound health on delivery" clause.

Admittedly there is conflict throughout the country on this agency question but that problem does not lie within the scope of this article.

An earlier case, *Prudential Insurance Co. v. Gilligan*, 7 O.C.C. (N.S.) 397 (1905)[*] determined that where certain policies had been renewed after they had lapsed and no copy of the renewal application had been returned to the insured—

> "The words of the statute clearly contemplate that there may be more than one application in connection with any policy. It certainly, at the time of the renewal, was within the power of said insurance company to have returned to the insured a copy of the application on which said policy was renewed." (Page 398).

In other words, the statute specifically requires the return of "each" application and hence, said the court, the contention of the company was not well taken to the effect that

> " . . . inasmuch as this application was made long after the insurance policy had been issued, that in the nature of things, it could not be returned with and as part of the policy as provided in Section 3623 Revised Statutes (now Gen. Code §9389) and that therefore said section of the statute is not applicable to it." (Page 398).

In contrast to the above two cases is *Esber v. New York Life Insurance Co.*, 10 Oh. Op. 116, 25 Ohio Abs. 318, reversing in part 22 Ohio Abs. 614 (1937), wherein the court attempted to clarify the unnecessarily broad rule of the *Svonavec* case as to the required time for delivery of the application. In the *Esber* opinion it was pointed out that even though the first sentence of General Code Section 9389 apparently contemplated a return of the application simultaneously with delivery of the policy, still the penalties contained in the last two sentences of that section contemplate first, an estoppel only "so long as it (insurer) is in default" and second, a permanent bar exists against utilizing material in such application as a defense on the policy only if "such company neglects for thirty days after demand therefor" to furnish insured with full and complete copies. Continuing, the court observed:

> "Can it be inferred from this that the court (in the Svonavec case) meant to say in effect that where the insurer fails to return to the taker, the copy of the

[*] Discussed by Calvin Wells III, *Insurance Counsel Journal, October 1937*, supra, note 9.

application at the precise moment the policy is returned, the default resulting therefrom, cannot be cured by returning the copy to the taker at a later date during the lifetime of the taker?" (Page 320).

In answer to this question the court held that on the state of the pleadings before it, the defendant, *New York Life Insurance Company,* was

"entitled to plead as a defense to the petition in connection with its claim that it has returned to the plaintiff a copy of the application (albeit the return was made nine or ten months after the policy was reinstated) and to plead the untruth of the application for reinstatement." (Page 320).

If any rule can be deduced from the above Ohio cases it is that, while delivery of a copy of an unattached application after the death of insured does not comply with the Ohio statute, still a delivery of such application during the lifetime of insured, and within a reasonable time after delivery of the policy, will cure the defect of non-delivery and revive the insurer's right to rely upon matters contained in such application as a defense to an action on the policy. As to what is a reasonable time during which such late delivery can be made, we have only the *Esber* case as a guide, and there it was held that the insurer at least could plead the untruth of matters contained in the application and thereby put in issue the facts allegedly misrepresented by insured pending a determination as to whether the delay involved was reasonable or unreasonable.

c. MEDICAL EXAMINER'S REPORT

The announced purpose of the Ohio Legislature in enacting General Code Section 9389 has already been stated. If any further definition of such purpose is required, the following from *Campbell v. Monumental Life Insurance Co.* (supra, note 13) will suffice:

"The purpose of these statutes is plain. It is to bring home to the insured *all the questions put to her* and answers *made by her in* her application and to apprise her of the fact that all of these become a part of the contract by which she must be bound." (Page 424). (Italics supplied).

Emphasis is placed upon the portion of the above statement looking toward participation by the applicant in the preparation of the documents to be considered a part of the application as defined by the Ohio statute. This though is in accord with the definition of application as announced in Bouvier's Law Dictionary where, with reference to an application for insurance, it is set forth as—

"The preliminary statement *made* by a *party* for an insurance on life, or against fire. It usually consists of *written answers* and *interrogatories* proposed by the company applied to, respecting the proposed subject." (Italics supplied).

The participation of the applicant again is emphasized as a basis for distinguishing the type of medical examiner's report, which constitutes nothing more than a professional analysis of a physician employed by an insurance company as to the advisability of writing insurance upon an individual, from the type document often also called a medical examiner's report, or report of examining physician, which, in fact, is an application as contemplated by the Ohio statutes and the statutes of many other jurisdictions. The feature of the latter type of reports which is absent in the former is the question and answer device utilized to obtain from the applicant facts as to him and his family; medical history that is readily available from no other source. Such documents therefore do involve participation by the applicant in their completion and usually also contain the signature of the applicant under some form of attestation clause.

Whether a specific "report of examiner" is a part of an insurance application such as is required to be returned to the applicant under General Code Section 9389—and similar statutes in other jurisdictions—is a question of law to be determined by the specific court involved. We know of no Ohio case which bears upon the precise point here presented. It is suggested, however, that there is room, even under the Ohio statute, to establish the rule that the word "application" covers only those documents wherein participation by the ap-

plicant is a fundamental requisite. Therefore, the type of "examiner's report" above indicated, which takes on the guise of an interdepartmental memorandum from a physician employed by the insurance company to his corporate colleagues, evaluating the applicant's current physical condition, is not a part of an application a copy of which must be returned with the policy. It is assumed that like reasoning is applicable to any document, executed during the period of negotiations between the prospective insured and the insurer, wherein the insured does not participate, either by supplying factual information to be incorporated into some document, or by affixing his signature to such instrument. In other words, it is possible that some documents might bear the title "application" and yet not be required to be returned to the insured, if such documents embody no participation by the insured. Any such approach, however, is, of course, subject to the rule that documents purporting to be part of the entire insurance contract must be delivered to insured, regardless of insured's participation in its execution.

III. PRACTICE AND PROCEDURE GENERALLY

Any discussion on such a litigious question as limitations on statutory denials of defenses contained in unattached life insurance applications must necessarily be limited. Decisions representative of only a few of the problems presented will be examined, viz. return of an amended or supplemental application, reinstatement applications, agent's memorandums and medical examiner's reports as part of the application, what constitutes a full and complete application, and attempted waiver of statutory restrictions.

a. AMENDED APPLICATIONS

It goes without saying that the omission of a part of an application among the documents returned to applicant excludes the whole, and, therefore, a statute requiring attachment of the application requires the attachment of a supplemental application if insurer is to rely on any defenses contained in either,[17] and the same rule applies where an original application is later amended.[18]

Where a company sought to deny liability on a life policy on the ground that a supplemental application changing an ordinary life contract to a whole life policy containing a provision for double indemnity, was not signed by insured but instead bore the insured's name actually signed by his wife, the beneficiary, who subsequently committed suicide while awaiting trial for the murder of insured, recovery was allowed for $99,500, that being the face amount of the double indemnity provision with accrued interest.

The court relied on Section 57-224 *Wyoming Revised Statutes* to the effect that no policy shall be issued which does not contain a provision that the policy and attached applications shall constitute the entire contract. There was no statement in the policy to the effect that the company intended that the policy was not fully issued or that it was not to be effective until the amendment to the application was signed. The company thus was not allowed to avoid the policy on the ground that no binding and completed contract existed because the amendment to the application was not signed and a copy attached to the policy."

Here is an extreme application of the type of statute under consideration in a situation in which the insurance company had done all in its power to comply with the statute and still was denied the opportunity to insist that the insured also comply with statute as to signing the second application. The opinion is silent as to whether the insured's purported signature, as made by his wife, was such as to have indicated to the company that it was not executed by insured.

Also, on the other hand, where, when an applicant applied for a second policy of insurance, ten days after a prior application, and when applicant did not undergo a second physical examination or make accompanying representations relating to his physical condition, and where a full and complete copy of the first application

[17] *Fisher v. Fidelity Mutual Life Insurance Company*, 188 Pa. St. 1, 43 W.N.C. 95, 41 A. 467 (1898).

[18] *Fidelity Title and Trust Company v. Mutual Life Insurance Company*, 305 Pa. 296, 157 A. 614 (1931).

[19] *Metropolitan Life Insurance Company v. Banion*, C.C.A. 10, 106 Fed. 561, (1939) dismissed per stipulation of counsel 309 U.S. 691 (1940).

was attached to the second policy and referred to therein as part of the contract of insurance and when insured certified his physical condition had not changed since the first examination, it was held that insurer could rely on misrepresentations contained in original application.[20]

Tennessee would seem to favor a more liberal construction of the problem as it was there held that when insured had applied for one type of insurance, which was refused by the company, and was given another policy and a separate application containing no new questions, but operating merely as an agreement to accept a different form of insurance, it was not necessary that the amended application be attached to the policy in order that the company might raise the question of false answers in the application.[21]

As to amended applications, it may be said that when an insured is fully advised, under an original application, of all the elements going to make up his contract, and if the supplemental application in no way includes matter of which the insured is not fully cognizant, insurer may not be denied defenses arising out of such original application when a supplemental application was not attached.

b. REINSTATEMENT APPLICATIONS

This portion of the general problem has been previously reported in this Journal.[22]

c. AGENT'S MEMORANDUMS

Certain jurisdictions have recognized, by inference at least, the proposition previously advanced that a document generally requires participation by the applicant to be within statutory contemplation as part of an application.

For instance, statutory requirements as to furnishing insured with copies of applications have been held not applicable to a preliminary statement forwarded by the agent to the company and signed by the agent alone, especially where such preliminary statement is not referred to in the policy.[23] Likewise, where insurer furnished its agent with a printed blank bearing the captions "Proposal for Insurance to be Signed by Applicant" and "Memorandum for Solicitor to Sign," it was held neither was within the Massachusetts statute requiring attachment of correct copy of application if latter is to be introduced into evidence.[24]

To the same effect is *Liverpool and London, and Globe Insurance Company Ltd. v. Baggett*, 115 Tex. 144, 277 S.W. 78 (1925) which involved an agent's report in connection with an application for a fire policy.[25]

d. MEDICAL EXAMINER'S REPORTS

Excellent coverage as to the division of authority in this country on this topic is found in 29 *Am. Jur.* 191, notes 9 to 11, citing annotations at 105 A.L.R. 500 and 18 L.R.A. (N.S.) 1191. The weight of authority is indicated in the above reference as favoring the requirement that copies of medical examiner's reports must be returned to the insured as part of his contract.

If, however, the rationale suggested in the discussion of medical examiners' reports under Ohio law is applied, the conflict of authority becomes less apparent. In other words, a helpful test in determining whether such reports shall be considered material parts of the entire insurance contract, is that of looking toward the extent

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[20] *Northwestern Mutual Life Insurance Co. v. Gott*, C.C.A. D.C., 62 App. D.C. 379, 68 F. (2d) 426 (1933).

[21] *Lindsey v. Metropolitan Life Insurance Co.*, 10 Tenn. App. 293 (1929).

[22] Supra, Note 9.

[23] *Griffith v. Metropolitan Life Insurance Company*, 36 App. D.C. 8 (1910) held preliminary statement of agent was no part of the insurance contract and need not be delivered with the policy.

[24] *Bonville v. John Hancock Mutual Life Insurance Company*, 200 Mass. 197, 85 N.E. 1057 (1908) construing Revised Laws c. 118 §73. See also *Langdeau v. John Hancock Mutual Life Insurance Company*, 194 Mass. 56; 80 N.E. 452, (1907).

Insured signed a "proposal" for insurance as well as an application. Application was returned with policy, proposal was not. Where all information contained in the proposal was also incorporated in the application, except name of the beneficiary, held this omission did not concern an essential element of the contract upon which the right of the company to avoid it depended and "proposal" need not be returned to insured to satisfy the statute. *Metropolitan Life Insurance Co. v. Hawkins*, 31 App. D.C. 493, 14 Ann. Cas. 1092 (1908) agent's certificate not required to be returned to insured.

[25] The omission, from a returned copy of an application for a fire policy, of an agent's report contained on the back of the original application was immaterial as the report was not an essential part of the application.

of the applicant's participation in the execution of the document.

Assuming there has been participation by insured, either by supplying factual answers as to him and his family's medical history, or if he has signed the document, or both, then such document would be almost universally considered to be a material part of the contract, or at least part of the "entire contract," and, as such, within most statutes requiring the return of full and complete copies of such documents to insured in order that insured may be apprised of all facts upon which the insurer has relied in issuing the policy.

Specifically, then, it may be said that the various types of cases listed below are consistent as to their treatment of medical examiner's reports and as to the availability of defenses contained therein whether they hold:

(1) A copy of the report must be returned as part of the application because of a specific statutory pronouncement to that effect, or the report itself states it is to be part of the contract, if the usual defenses are to be available[26] or,

(2) A copy of the report must be returned because the facts show that there was participation by the insured, and hence the courts have determined that the report was part of the application which must be returned if the usual defenses are to be available,[27] or

(3) A copy of a report involving no participation by applicant need not be returned because specifically declared by statute, or when report shows on its face that it is not part of the application, and hence the usual defenses are available whether report was returned or not,[28] or

(4) A copy of the report need not be returned because the particular type of report did not require participation by the insured, and hence the usual defenses are available whether the report was returned or not.[29]

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[26] *Taylor v. Security Benefit Association of Topeka*, 270 S.W. 132 (1925) (Mo. App.); *Keller v. Home Life Insurance Co.*, 95 Mo. App. 627, 69 S.W. 612, (1902), statute required return of application *and* medical examination signed by applicant, however, findings and conclusions of physicians need not be returned. See notes 28, 29.

[27] *U. S.—Mutual Life Insurance Co. v. Hilton-Green* (C.C.A. 8), 202 Fed. 113 (1913). No exclusionary statute under consideration but held medical examination report part of the contract when insured participated.

Metropolitan Life Insurance Co. v. Hawkins, 31 App. Cas. (D.C. 493, 14 Ann. Cas. 1092) (1908) portion of report wherein insured participated must be returned other portions including examiner's report to company not required, see note 29; *Paulhamus v. Security Life and Annuity Co.* (C.C. Pa.) 165 F. 554 (1908).

Colo.—Northwestern Life Insurance Co. v. Tietze, 16 Colo. App. 205, 64 P. 773 (1901).

Ill.—Weisguth v. Supreme Tribe B.N., 194 Ill. App. 17, aff'd. 272 Ill. 541 (1915). Answers of applicant to questions of medical examiner.

Iowa—Goodwin v. Provident Savings Life Assurance Association, 97 Ia. 226 32 L.R.A. 473, 66 N.W. 157 (1896); no medical report returned at all—held application, without more did not satisfy statute—case is consistent as the inference is, had there been a medical report in which insured had participated—it would be required to be returned with policy; *Rauen v. Prudential Life Insurance Co.*, 129 Ia. 725, 106 N.W. 198 (1900)—medical report contained representations made by applicant to medical examiner.

Mass.—Paquette v. Prudential Insurance Co., 193 Mass. 215, 79 N.E. 250 (1906) application includes questions and answers and signed by insured.

N. J.—Dimick v. Metropolitan Life Insurance Co., 69 N.J. L. 384, 62 L.R.A. 774 (1903) statements to medical examiner signed by applicant.

N.Y.—Ames v. Manhattan Life Insurance Co., 40 App. Div. 465, 52 N.Y.S. 759, aff'd. without opinion 167 N.Y. 584, 60 N.E. 1106 (1901).

Pa.—Morris v. State Mutual Life Assurance Co., 183 Pa. 563, 39 A. 52 (1898) document called medical examiner's report but contained questions and answers, hence participation.

[28] *Ky.—Moriarity v. Metropolitan Life Insurance Co.*, 180 Ky. 207, 202 S.W. 630 (1918) statute requires "signed by applicant," if report not signed, it need not be returned.

Mass.—Nugent v. Greenfield Life Association, 172 Mass. 278, 52 N.E. 440 (1899) statute refers to documents signed by applicant.

Mo.—Taylor v. Security Benefit Association of Topeka, Mo. App. 270 S.W. 132 (1925), statute refers to document signed by applicant.

N.Y.—Boehm v. Commercial Alliance Ins. Co., 9 Misc. 529, 30 N.Y.S. 660, aff'd. without opinion 35 N.Y.S. 1103 (1895).

Penn.—Baldi v. Metropolitan Life Ins. Co., 18 Pa. Super. Ct. 599 (1902) medical examination and report bore caption "no part of declaration of applicant." Pa. statute also requires application to be signed by applicant. See *Moncur* case, note 29.

[29] *U.S.—Hews v. Equitable Life Assurance Society*, (C.C.A. 3), 143 Fed. 850 (1906), construing Pa. law, Opinion not clear, applicant participated but held such answers not within statute and hence admissible even though document not attached to policy; *Metropolitan Life Insurance Co. v. Hawkins*, 31 App. Cas. D.C. 493, 14 Ann. Cas. 1092 (1908) medical report to the company.

Iowa—Johnson v. Des Moines Life Insurance Co.,

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FULL AND COMPLETE COPY

Helpful cases as to what constitutes a full and complete copy, and what variations from an exact copy constitute sufficiently material variations so as to come within the bar of restrictive statutes, are collected in 105 *A.L.R.* 497.

In addition, answers to questions put to an applicant's employer were not considered part of a full and complete copy of the application[30] nor were certain unfilled blanks relating to insured's business and address fatal.[31]

The omission of signatures in a purported true copy is fatal[32] but omission of a certificate of loan is not fatal as it concerns a collateral agreement,[33] and neither is the omission of words endorsed on a policy by the agent merely indicating the effective date of the contract.[34]

On the question of materiality of the variance between the original and a purported full copy as required by statute, the rule is that the copy should be so exact and accurate, if not a photograph, that upon comparison it can be said to be a true copy without resorting to construction. *Johnson v. Des Moines Life Insurance Co.*, 105 Ia. 273, 75 N.W. 101, 105 A.L.R. 499 (1898).

Photostatic copies of applications, though reduced in size, are considered to be complete copies if they are legible in letters of fair size, not blurred or dimmed by reduction through the photographic process.[35]

ATTEMPTED WAIVER

The requirements of statutes rendering applications unavailable to insurers for matters of defense cannot be waived by the insured, even by expressly so stipulating in the application, since such statutes do not confer a mere personal right but establish public policy.[36]

An attempt has been made to ascertain the pattern which courts have followed in the various situations which have develop-

[30] *Bryan v. Fidelity and Casualty Co.*, 171 Wash. 457; 18 P. 2d 482 (1933).

[31] *Kayser v. Occidental Life Insurance Co.*, 231 Ia. 620; 1 N.W. 2d 715 (1942), also applying rule of reasonableness, saying mere dotting of an "i" or crossing of "t" after the insured had signed would not prevent copy from being full and complete, purpose of statute is to require that all writings composing the contract shall appear together and be in possession of insured to represent his entire contract.

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105 Iowa 273, 75 N.W. 101, (1898) independent examiners report.

Ky.—Moriarity v. Metropolitan Life Insurance Co., 180 Ky. 207, 202 S.W. 630 (1918), physician's report on back of application—not signed by insured.

Mass.—Nugent v. Greenfield Life Association, 172 Mass. 278, 52 N.E. 440 (1899) medical examiner's report to the company only; *Paquette v. Prudential Insurance Co.*, 193 Mass. 215, 79 N.E. 250 (1906) no participation in preparation of examiner's report.

Mo.—Taylor v. Security Benefit Association of Topeka, (Mo. App.) 270 S.W. 132 (1925), statute requiring return to insured of copy of medical examination, not applicable to findings and conclusions of medical examiner.

N.Y.—Higbee v. Guardian Mutual Life Insurance Co., 66 Barb. 462, aff'd. 53 N.Y. 603 (1873) paper headed "Question to be answered by medical examiner for the company" not deemed part of application; *Edington v. Aetna Life Ins. Co.*, 77 N.Y. 564, (reversing 13 Hun 543) report of examining physician—no part of contract, it was to be made after application executed and made for the company. *Stark v. Masonic Life Assn.*, 180 N.Y.S. 235; aff'd. 184 N.Y.S. 952, 194 App. Div. 900 (1920) examining physician's certificate need not be returned to applicant.

Pa.—Baldi v. Metropolitan Life Insurance Co., 18 Pa. Super. Ct. 599 (1902) no participation statement of physician to his principal need not be returned to insured. *Moncur v. Western Life Indemnity Co.*, 269 Pa. 213, 112 A. 476 (1921), examiner's report going to company only is not part of contract. *Reeder v. Metropolitan Life Insurance Co.*, 340 Pa. 503, 17 A. 2d 879 (1941), examiner's report going only to company need not be returned to insured.

[32] *Seiler v. Economic Life Association*, 105. Ia. 87, 74 N.W. 941, 43 L.R.A. 537 (1898); *Dunbar v. Phoenix Ins. Co.*, 72 Wis. 492, 40 N.W. 386 (1888); and *Liverpool and London and Globe Insurance Co. Ltd. v. Baggett*, 115 Tex. 144, 277 S.W. 78 (1925).

[33] *Exchange Bank of Bloomfield v. Illinois Life Insurance Co.*, 187 Ia. 253, 174 N.W. 260 (1919), insurer not precluded from relying on certificate of loan, even though it had not been attached to the copy of the application which was returned to insured, in an action by an assignee to have the policy reinstated. *Deacon v. Fidelity Mutual Life Ins. Co.*, 185 Ia., 1387; 169 N.W. 780 (1918).

[34] *Cline v. Iowa State Life Stock Insurance Co.*, 195 Ia. 918, 192 N.W. 309 (1923).

[35] *New York Life Insurance Co. v. Miller*, (C.C.A. 8) 73 F. 2d 350; 97 A.L.R. 562 (1934). See also 105 A.L.R. 498 for annotation.

[36] *93 A.L.R. 381 Annotation*—cases to this effect from Iowa, Ky., Pa., Okla., La., N.J. and N.Y. All such statutes go to the remedy and not to the validity of insurance policies, and since such statutes have no extra territorial effect, any claims of false statements in unattached applications may be made in jurisdictions having no similar statutes.

ed under statutes denying to insurers defenses contained in unattached applications for life insurance, and to suggest certain approaches to the questions involved which may be common to the problems in whatever jurisdiction such questions might arise. It is hoped that this offering will induce others to look further into the subject, and that this treatment will, at the same time, be of assistance in helping to rationalize the law relative to the practice and procedure under this type of statute.

The Priority of The United States in Relation to The Contractor's Sureties Under The Miller Act

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THE first decision has been rendered as to the priority of the United States over the contractor's sureties under the Heard Act.[1] On January 7, 1946, the Court of Claims of the United States in the *Schmoll* case,[2] held that the United States had priority over the surety on a *payment* bond, but expressly limited its decision to that surety and left open the question of whether the same ruling would apply to the surety on a *performance* bond. This holding illumines the situation under the Miller Act[3] (which is the successor to the Heard Act), because the Court treats the payment and performance bonds as being separate instruments,[4] which is the situation under the Miller Act.

The Government's claim against the contractor included damages for correcting defective work on two contracts which were not bonded by the surety involved in the litigation, and also capital stock tax. The government sought to offset that tax and damages against the earned balance of the contract price due by the Government on other jobs which were bonded by the surety involved in the litigation. The Government caused all jobs to be completed—some at a slight loss, and others leaving a substantial surplus. In the ultimate accounting, the surety was caused to suffer loss only under the payment obligation. The surety claimed to be entitled to receive the earned contract surplus balances without deduction for the stated offsets.

The priority statute, commonly known as Section 3466 (U. S. Revised Statutes)[5], has been in force, in substantially its present form, since 1799. It provides, in part, that "whenever any person indebted to the United States is insolvent . . . debts due the United States shall be first satisfied . . ." It has been judicially construed many times in various settings. The new setting of suretyship in the *Schmoll* case suggests consideration of some of the pertinent features of the statute.

The statute is to be *liberally* construed in favor of the Government. This kind of construction was early[6], as well as recently[7], declared by the Supreme Court. It is based on the purpose of the statute "to secure adequate public revenues to sustain the public burden."[8] It is perhaps not without significance that so eminent an authority as Chancellor Kent[9] held to the opinion that the statute should be strictly construed, as being in derogation of the general rights of creditors.

The contractor in the *Schmoll* case was a corporation. The term "person," as used

[1] 40 U.S.C.A. 270 (See historical note to 270-a).
[2] Schmoll v. United States, 63 F. Supp. 753.
[3] Act of August 24, 1935, 40 U.S.C.A. 270a.
[4] The bonds in this case were given pursuant to the Heard Act and not the Miller Act. Therefore the payment and performance obligations were not separate instruments (as required by the Miller Act) but were single instruments embracing both obligations as required by the Heard Act. However, the Court spoke of the obligations as if they were embraced in separate instruments.
[5] 31 U.S.C.A. 191. It should be noted that Section 193 gives to sureties the like priority of the United States.
[6] Beaston v. Farmers' Bank of Delaware, 37 U.S. 102 (1838).
[7] U. S. v. Emory, 314 U.S. 422 (1941).
[8] U. S. v. Emory, 314 U.S. 422 (1941).
[9] 1 Kent's Commentaries, star page 247.

in the statute, was early held to include a corporation.[9]

Part of the Government's claim in the *Schmoll* case was for taxes. The statutory term "debts" due to the United States, has been finally settled by the Supreme Court to include taxes.[10]

"Insolvency" within the statute must be of a particular kind and manifested in a particular way. With reference to the *kind* of insolvency, the statute makes it apply only in cases where the debtor "not having sufficient property to pay all his debts . . ." This has always been construed not to apply to mere inability of the debtor to pay all his debts in the ordinary course of business. Thus, where pursuant to state law a bank was found to be insolvent and unable to pay its debts and to continue as a going concern, and was taken over by the bank commissioner, but such insolvency under the state law was not necessarily with reference to insufficiency of assets, the priority statute was held not to apply.[11] With reference to the *manifestation* of insolvency, it must be in one of the modes pointed out in the statute,[12] viz: (1) voluntary assignment by the insolvent of all[13] his property to pay his debts; or (2) in which the estate and effects of an absconding, concealed or absent debtor are attached by process of law; or (3) in which an act of bankruptcy is committed; or (4) death of the insolvent. In *United States v. Hooe*,[14] a collector of the revenue had mortgaged part of his property to his surety in his official bond, to indemnify him from his responsibility as surety, and to secure him from his existing and future endorsements for the mortgagor at bank; and the mortgage was held valid against the claim of the United States, although the collector was, in point of fact, unable to pay all his debts at the time the mortgage was given; and although the mortgagee knew, when he took the mortgage, that the mortgagor was largely indebted to the United States. Chief Justice Marshall pointed out that if the priority existed from the time the debt was contracted, and the debtor should continue to transact business with the world, the inconvenience would be immense. It has been said that these modes give to the world some reasonable and definite test by which to ascertain the existence of the latent and dangerous preference given by law to the United States.[15]

In the *Schmoll* case, the kind of insolvency required by the statute was not commented upon by the Court, although the burden of proof is upon the Government.[16] The Court found the manifestation of insolvency in mode (1) above. In a previous case[17] between a payment surety and the Government, the same Court found none of the above modes, with the result that the statute was held inapplicable.

The statute creates neither a lien nor the equivalent of a lien. It creates merely a right of prior payment.[18] In requiring that "the debts due to the United States shall be first satisfied," the statute clearly contemplates resort only to the property of the debtor.[19] There has always been a question as to what interest of other parties in that property may defeat the priority of the Government. At an early date, it was recognized that "Exceptions there must necessarily be as to *the funds* out of which the United States are to be satisfied . . ."[20] (Italics original). Also, the priority was regarded not to affect any lien, general or specific, existing when the event took place which gave the Government a claim of priority.[21] An *inchoate general* lien has fallen, however. It is settled that an inchoate lien is not enough to defeat the priority, and that "a specific perfected lien . . . alone bars the priority of the United States." The *Knott* case,[22] so holding, shows the length of the modern reach of the statute. There, a surety company deposited securities with the State Treasurer of Florida in order to qualify to do business and for the protection of Florida residents.

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[9]Beaston v. Farmers' Bank of Delaware, 37 U.S. 102 (1838).

[10]Price v. U. S., 269 U.S. 492 (1926).

[11]U. S. v. Oklahoma, 261 U.S. 253 (1923) and cases cited.

[12]U. S. v. Oklahoma, 261 U.S. 253 (1923).

[13]U. S. v. Hooe, 7 U.S. 73 (1805).

[14]U. S. v. Hooe, 7 U.S. 73 (1805).

[15]1 Kent's Commentaries, star page 246.

[16]U. S. v. Hooe, 7 U.S. 73 (1805).

[17]Maryland Casualty Co. v. U. S., 53 F. Supp. 436 (Court of Claims, 1944).

[18]Conrad v. Atlantic Ins. Co., 26 U.S. 386 (1828).

[19]See e.g. U. S. v. Hooe, 7 U.S. 73 (1805); Thelusson v. Smith, 15 U.S. 396 (1817); Brent v. Bank of Washington, 35 U.S. 596 (1836).

[20]Thelusson v. Smith, 15 U.S. 396 (1817).

[21]Brent v. Bank of Washington, 35 U.S. 596 (1836).

[22]U. S. v. Knott, 298 U.S. 544 (1936).

It entered into many surety obligations in Florida.

Upon its insolvency, the United States filed a claim for priority for judgments recovered against the Company in Florida on bail bonds given there. The Florida officials insisted that the claim of the United States must be postponed to those of Florida creditors. The Supreme Court of Florida in construing the statutes declared that the deposit created "a trust fund." The Supreme Court of the United States held that the quoted phrase "appears to have been used to connote an inchoate general lien for the benefit of those persons who may become entitled to be paid from the proceeds, either as unsatisfied judgment creditors, or as Florida creditors at the time when insolvency supervenes. Such interest lacks the characteristics of a specific perfected lien which alone bars the priority of the United States." A *specific* lien has received varied treatment by the Supreme Court. In early cases,[24] the Court enumerated various specific liens which were considered not to be cut out by the priority of the Government. Among the enumeration, was "the lien of an artisan for work and services upon the specific thing."[25] Previously executed mortgages were always stated to be in the excepted category. This repose to mortgagees has, however, been seriously shaken in recent years. The Supreme Court[26] has questioned the current vitality of the doctrine of the old mortgage cases, as well as whether that doctrine would require the subordination of claims of the United States to a specific and perfected lien. These far-reaching questions posed by the Supreme Court, have not yet been answered by it. As late as 1945, in the *Waddill Co.* case,[27] the Court said it has not yet reached such questions. In that case, the highest court of Virginia construed the statutes of that state to give a landlord a lien which is fixed and specific, and which relates back to the beginning of the tenancy. The state court held that such lien of the landlord defeated the priority of the United States. The Supreme Court disagreed, and reserving to itself separate inquiry into a lien's actual legal effect, independently of the state court's construction thereof, found the landlord's lien to be neither specific nor perfected or "to cast any serious doubt" on the priority of the United States. Significantly, the Supreme Court in modern cases has not yet found a single lien, public or private, to be sufficiently specific and perfected, in its judgment, as to defeat the priority of the United States.

Finally, the application of the priority statute depends strikingly on the nature of the proceeding in which it is asserted.[28] For instance, if the contractor in the *Schmoll* case had been in bankruptcy, the priority statute would not have been applicable, because it yields to the specific distribution scheme of the bankruptcy act.[29]

We now turn to the nature and extent of the interest of the contractor's sureties under the Miller Act, in moneys which have been earned under the contract and are in the possession of the Government.

Regarding the nature of the interest of the sureties, the *Schmoll* case distinguishes sharply between the surety on the payment bond and the surety on the performance bond. The bases asserted for this distinction are (1) that the retained percentage, while securing the performance of the contract, does not secure the payment of laborers and materialmen; (2) that if the contractor fails or refuses to pay his laborers or materialmen, the Government is not liable therefor; and (3) the government is not obligated or authorized to use the retained amounts to pay them. Therefore, concluded the Court, the surety upon payment of them, acquires no equitable lien on the retained amount, since it was not retained to secure performance of the obligation which the payment surety discharges.

The view that retained percentage under a Miller Act contract[30] does not secure the payment of laborers and materialmen, is in accord with the *California Bank* case,[31]

[24]See e.g. Conrad v. Atlantic Ins. Co., 26 U.S. 386 (1828).

[25]Conrad v. Atlantic Ins. Co., 26 U.S. 386 (1828).

[26]U. S. v. State of Texas, 314 U.S. 480 (1941).

[27]U. S. v. Waddill Co., 323 U.S. 353 (1945).

[28]The curious differences are well discussed by O. John Rogge, "The Differences in the Priority of the U. S. in Bankruptcy and in Equity Receiverships." (1929) 43 Harvard Law Review 251.

[29]Re Van Winkle, 49 F. Supp. 711 (1943) and authorities therein cited.

[30]Cf. Note 4.

[31]California Bank v. U. S. Fidelity and Guaranty Co., 129 F. (2d) 751. (C.C.A. 9, 1942). For a discussion of this point under the Heard Act, see Judge Sibley's dissenting opinion in American Surety Co. v. Westinghouse Electric & Manufacturing Co., 75 F. (2d) 377 (C.C.A. 5, 1935).

as is also the view that the Government is not legally liable to pay such claimants.

The view that the Government is not obligated or authorized to use the retained percentage to pay labor and material claimants, is opposed to the *California Bank* case.[22] Opposition is also found in authorities under the Heard Act.[23]

The *Schmoll* case further confined the position of the payment surety by subrogation to "its principal's rights against the United States." The subrogation of the surety is not so limited, however, and includes the rights of the United States under the contract,[24] and the rights of laborers and materialmen.[25]

Many authorities hold that the surety acquires special rights through the laborers and materialmen. Thus, those claimants have been held to have an equitable right[26] to payment from job moneys, or an equitable lien[27] thereon, to which, of course, the surety is subrogated.

In connection with subrogation, it is well established that that right of the surety relates back to the date of the bond,[28] although not without exception.[29]

Where the foregoing derivative rights of the surety were found to be lacking, some judges have worked out direct and original rights of the surety. Thus, the trust fund doctrine has been invoked,[30] and again the surety was held to have a "contractual right" to the benefits of the owner under the contract.[31]

Akin to direct and original rights of the surety, is the view of recent cases,[32] involving the tax lien of the Government, holding to the effect that a defaulting contractor is not the owner of earned but unpaid contract moneys, and he has no right thereto; and such moneys belong to the surety, apparently by operation of law; with the result that the Government's tax lien does not apply to such moneys.

Also unrelated to subrogation, is the established principle of suretyship that the obligee is obligated to apply job moneys against the liability of the surety, at least as respects the performance bond, and this obligation is so strong that failure to do so will discharge the surety pro tanto.[33]

As stated above, the *Schmoll* case distinguishes sharply between the payment bond and the performance bond. Where the laborers and materialmen, and the owner too on their account, are denied all avenues of approach to the retained percentage, the fact that the payment bond is a separate instrument has sometimes accentuated the problem of working out the rights of the payment surety under state

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[22]California Bank v. U. S. Fidelity and Guaranty Co., 129 F. (2d) 751 (C.C.A. 9, 1942).

[23]Morgenthau v. Fidelity and Deposit Co., 94 F. (2d) 632 (Ct. App. D.C., 1937). Cf. Martin v. Natl. Surety Co., 300 U.S. 588 (1936) where the "duty" of the contractor to the Government, to pay laborers and materialmen, is pointed out.

[24]Moran v. Guardian Casualty Co., 76 F. (2d) 438 (Ct. App. D.C., 1935).

[25]See authorities cited in notes 33 and 34.

[26]U. S. Fidelity & Guaranty Co. v. Sweeney, 80 F. (2d) 235 (C.C.A. 8, 1935).

[27]Cox v. New England Ins. Co., 247 Fed. 955 (C.C.A. 8, 1917).

[28]Prairie State Bank v. U. S. 164 U.S. 227 (1896).

[29]California Bank v. U. S. Fidelity and Guaranty Co., 129 F. (2d) 751 (C.C.A. 9, 1942).

[30]Judge Sibley, dissenting in American Surety Co. v. Westinghouse Electric & Manufacturing Co., 75 F. (2d) 377 (C.C.A. 5, 1935). "The surety has a direct right, and also a right by subrogation, in respect of the retained percentages." Commenting upon the Prairie case, he said: "The surety was held to have an original right to be secured by the fund so set apart, and also a secondary equity to be subrogated to the right of the United States to retain it." Commenting upon the Henningsen case, he said: "• • • and it would also seem that if it was so retained the surety would not need any subrogation because he had a direct and original right to be protected by the fund so set apart, it being a trust." See generally, Maryland Casualty Co. v. U. S., 53 F. Supp. 436 (Ct. of Claims, 1944).

[31]Pratt Lumber Co. v. T. H. Gill Co., 278 Fed. 783 (D. C., 1922).

[32]N. Y. Cas. Co. v. Zwerner, 58 F. Supp. 473 (D. C., 1944); F. H. McGraw & Co. v. Sherman Plastering Co., 60 F. Supp. 504 (D. C., 1945). See also Re Heintzelman Construction Co. 34 F. Supp. 109 (D. C., 1940); U. S. Fidelity & Guaranty Co. v. Triborough Bridge Authority, 48 N.Y.S. (2d) 16 (1944). In USF&G Co. v. Sweeney, 80 F. (2d) 235, 240, it was said: "If an appropriation of the money was in fact made to protect laborers and materialmen or appellant as subrogee, then a trust was created. The bankrupt or the trustee would have no interest in the trust fund except as to surplus, and it appears that there was no surplus. Certainly, the bankrupt had no property interest in this fund prior to the filing of the petition, which it could have transferred or which could have been levied upon and sold under judicial process against it. Philadelphia National Bank v. McKinlay, 63 App. D. C. 296, 72 F. (2d) 89."

[33]Southern Pacific Co. v. Globe Indemnity Co., 21 F. (2d) 288, (C.C.A. 2, 1927).

statutes, there being several instances[44] where the payment surety has been considered to acquire no interest in the retained percentage. As indicated above, however, the Federal Courts allow various avenues of approach to job moneys by the laborers and materialmen, by the Government on their account, and also by the surety. Under the Heard Act, the bond was a single instrument containing the dual obligations of performance and payment.[45] Construing this single bond, the *Henningsen* case[46] assimilated the payment obligation therein to a performance obligation, with respect to the rights of the surety. Under the Miller Act[47] there are two bonds —by separate instruments—one for performance and the other for payment. Construing the separate payment bond, the several cases,[48] with the exception of the *Schmoll* case, have recognized no distinction therein and have applied the Heard Act decisions. The Miller Act bears close similarity to the bases which existed under the Heard Act. Thus, the two obligations contained in the single bond under the Heard Act, were as distinct as if contained in "seperate instruments."[49] This judicial concept is now expressly embodied in the Miller Act. Again, "The Miller Act, like the Heard Act, is highly remedial in nature. It is entitled to a liberal construction and application in order properly to effectuate the Congressional intent to protect those whose labor and materials go into public projects."[50] Finally, "The Miller Act, while it repealed the Heard Act, reinstated its basic provisions and was designed primarily to eliminate certain procedural limitations on its beneficiaries. There was no expressed purpose in the legislative history to restrict in any way the coverage of the Heard Act; the intent rather was to remove the procedural difficulties found to exist under the earlier measure and thereby make it easier for unpaid creditors to realize the benefits of the bond."[51]

In concluding the nature of the interest of the sureties in earned job moneys, attention may be called to the usual additional right of the sureties arising out of express assignment by the contractor. It is now settled that an assignment with respect to the proceeds of a contract with the United States is not void, except at the option of the Government.[52] Presumably, that option would be exercised by the Government in a contest such as in the *Schmoll* case, and thereby render an assignment ineffectual in such contest.

Regarding the *extent* of the interest of the sureties in earned job moneys, there is a conflict of authority as to whether the rights of the surety extend beyond the retained percentage, so as to include other earned moneys such as progress payments.[53] Part of the money involved in the *Schmoll* case was not retained percentage, but the Court did not reach a consideration of the non-retained percentage in view of its decision with respect to retained percentage.

The Supreme Court of the United States has not foreclosed the various avenues of approach by sureties to earned job moneys.[54] It remains for that Court to determine the strongest avenue to be accorded the payment surety, and then decide whether it defeats or renders inapplicable the priority of the United States.

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[44]Sundheim v. School Dist. of Philadelphia, 166 Atl. 365 (Pa., 1933). Dissenting opinions in Riverview State Bank v. Wentz, 34 F. (2d) 419 (C.C.A. 8, 1929), and Century Cement Mfg. Co. v. Fiore, 36 N.Y.S. (2d) 332 (App. Div., 1942).

[45]Equitable Surety Co. v. U. S., 234 U.S. 448 (1914).

[46]Henningsen v. U. S. Fidelity & Guaranty Co., 208 U.S. 404 (1908)

[47]40 U.S.C.A. 270a.

[48]California Bank v. U. S. Fidelity & Guaranty Co., 129 F. (2d) 751 (C.C.A. 9, 1942); N. Y. Casualty Co. v. Zwerner, 58 F. Supp. 473 (D. C., 1944). See also Hedley v. New Amsterdam Cas. Co., 46 N.Y.S. (2d) 388 (App. Div., 1943) saying "the legal principles involved are the same," as between seperate payment and performance bonds under a state statute.

[49]Equitable Surety Co. v. U. S., 234 U.S. 448 (1914).

[50]MacEvoy Co. v. U. S., 322 U.S. 102 (1944).

[51]MacEvoy Co. v. U. S., 322 U.S. 102 (1944).

[52]Martin v. National Surety Co., 300 U.S. 588 (1936).

[53]First National Bank v. City etc. Surety Co., 114 Fed. 529 (C.C.A. 9, 1902); Lacy v. Maryland Cas. Co., 32 F. (2d) 48 (C.C.A. 4, 1929); Martin v. National Surety Co., 85 F. (2d) 135 (C.C.A. 8, 1936); Town of River Junction v. Maryland Cas. Co., 110 F. (2d) 278 (C.C.A. 5, 1940).

[54]So much has been recognized by that Court when it said: "Without denying the possibility of arriving at the same conclusion (in favor of the surety) through other avenues of approach . . . ." Martin v. National Surety Co., 300 U.S. 588 (1936).

Effect Of Transfer Of Car Ownership On The Standard Automobile Liability Coverages

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IN the absence of an express exception to the contrary, the named insured is committed to the following declaration by the standard automobile policy:

> "Except with respect to bailment lease, conditional sale, mortgage or other encumbrance the named insured is the sole owner of the automobile."

Where the insurer has previously taken a written application, such declaration is based upon a question in the application, which question is usually:

> "Except with respect to bailment lease, conditional sale, mortgage or other encumbrance, is the applicant the sole owner of the automobile?"

What meaning will the legally famous "reasonable man" be said to have ascribed to the word "is" as of the time the question was posed to him by the application and as of the time he received and read his policy? (The inconsistency attending the implication that a "reasonable man" reads his policy is admitted.) Assume that he has parted with ownership of the described automobile after his policy has been issued and before he has become involved in a serious liability accident while using such automobile. The "Reasonable Man" then contends that by using the word "is" without further qualification, the insurer confined the context of the question and answer to a statement of the then existing fact. With considerable logic, he says that where he is asked: "Is applicant a resident of Illinois?" and where, in response, he answers: "Applicant is a resident of Illinois," that such answer should not be interpreted as a promise that he will continue to reside in the particular state.

By choosing to use the unqualified word "is," the insurer most probably will be held by the Courts to have intended to elicit information as to facts existing at the time the application was taken. In the absence of express statement to the contrary, "the status of title or ownership set forth by the contract refers to the time of issuance of the contract or the effective date thereof."

Appleman, Insurance Law and Practice citing: Rosenstock v. Mississippi Home Ins. Co., 1903, 35 So. 309, at page 313, 82 Miss. 674.

Foristiere v. Aetna Ins. Co. Hartford, Conn., 1930, 285 P. 849, 209 Cal. 92.

Downs v. German Alliance Ins. Co., 1906, 67 A.146, 6 Pennewill 166.

Libby Lumber Co. v. Pacific States Fire Ins. Co., 1927, 255 P.340, 79 Mont. 166, 60 A.L.R. 1.

Collins v. London Assur. Corp., 1895, 30 A.924, 165 Pa. 298, 36 Wkly. Notes Cas. 26.

DeKeyser v. National Liberty Ins. Co. of America, 1935, 257 N.W. 673, 216 Wis. 566, 97 A.L.R. 766.

Mishiloff v. American Cent. Ins. Co., 1925, 128 A.33, 102 Conn. 370.

Insurance Co. of North America v. O'Bannon, 1918, 206 S.W. 814, 109 Tex. 281, 1 A.L.R. 1407, affirming Civ. App., 170 S.W. 1055.

If the insurer intended otherwise, to the word "is" it easily could have added the words "and will continue to be" and thus could have made its intention clear beyond doubt. Without undue straining of logic a Court could at least say that an ambiguity is here found in the policy and be obliged to adopt the interpretation which favors the insured unless the policy, when read as a whole, clearly indicates that it was reasonable for both the insurer and insured to understand that protection was to be terminated if ownership did not continue as stated in the declarations. In *Algoe v. Pacific Mutual Liability Insurance Company* (91 Wash. 324, 157 P. 993) the Court said: "Insurance is, in its nature, complex and

difficult for the layman to understand. Policies are prepared by experts, who know and can anticipate the bearing and possible complications of every contingency. So long as insurance companies insist upon the use of ambiguous, intricate, and technical provisions which conceal, rather than frankly disclose, their own intentions, the courts must, in fairness to those who purchase insurance, construe every ambiguity in favor of the insured."

Such rule is followed in every jurisdiction with the possible exception of Maryland. (Vol. 29 American Jurisprudence at Page 181.)

An examination of the present standard automobile insurance policy, which does not expressly provide that the policy shall be void if the interest of the named insured is other than that of an unconditional and sole owner, reveals only two provisions of possible importance in such regard: the "Policy period, Territory, Purpose of Use" clause and the condition entitled "Assignment." The former provides: "This policy applies only to accidents which occur ***** while the automobile ***** is owned, maintained and used for the purposes stated as applicable thereto in the declarations." Though there appear to be no court decisions involving the point, it is submitted that such wording may logically be interpreted to mean that so long as the automobile is "owned" (regardless of who owns it) "for the purposes stated as applicable" the insurance protection continues. In other words, if the named insured transfers ownership to a person who also owns and uses the automobile for the same purposes as those stated in the declarations, such policy provision would not prevent the insurance from continuing unimpaired by the transfer.

The "Assignment" provision states that "Assignment of interest under this policy shall not bind the Company until its consent is endorsed hereon." It is clear that, where the named insured himself is the one making claim for coverage, his interest in the liability coverages has been maintained and there should be no question arising under such condition. He has transferred his interest in the automobile; he has not transferred his interest in the policy protection. Too, it cannot be properly said that he does not have insurable interest. "A person operating (using) an automobile, whether holder of the record title or not, has an insurable interest as far as liability insurance is concerned (Appleman, Vol. 4 Insurance Law and Practice, page 490.) The question as to whether the named insured or spouse would be protected with regard to the use of other automobiles after ownership of the described automobile has been transferred is a question which, while not without some doubt, should be resolved in favor of the insurer. The "Use of Other Automobiles" provision of the policy provides that such coverage applies to the named insured *"if an individual and the owner of such (described) automobile."* Thus is seems clear that the named insured would not be covered for use of other cars after transfer of ownership to a person other than the spouse.

Such insuring agreement further accords protection to the spouse "of *such* individual if a resident of the same household." Thus coverage is made dependent upon whether the spouse is the spouse of *such* individual." If the effect of the use of the word "such" is to encompass the whole of the phrase "if an individual and the owner," then the spouse would have no protection if the individual named insured were no longer the owner of the described automobile (and provided the spouse was not the transferree when the named insured transferred ownership.) That should be the interpretation; to hold otherwise would result in the spouse being given protection not available to the named insured. All of this assumes that the Courts will hold that such insuring agreement speaks as of the time of the accident rather than speaking of ownership as of the time the policy was issued.

In states wherein the so-called vicarious liability statutes obtain, even though the named insured is not using the automobile, he may be chargeable with liability for an accident caused by his transferree where the transfer was not in compliance with the statute. In such an instance, the important question is whether the attempted transfer constituted such consent to the purported transferee to use the car as would bring the transferor within the scope of the statute. If such consent is found to exist as will bring the transferor (named insured) under the vicarious liability statute, then the insurer is in no position suc-

cessfully to contend that there was no permission within the scope of the "Definition of 'Insured'" clause of its policy.

The question of consent or permission under such clause is most important where the insurer is called upon to decide coverage where it finds that its named insured has transferred ownership to another person who thereafter is involved in an accident concerning which such other person requests coverage. If the insurer cannot avail itself of a defense based on the ownership declaration because the particular jurisdiction holds or would hold that the same is not "continuing" in nature, the only alternative is the contention that the transferee was not using the auto with the permission of the named insured.

In such circumstances, the authorities are in conflict. One line holds that the new owner has no permission since such permission would be a nullity because he has full legal authority to use the automobile as he chooses:

Whitney v. Employers' Indemnity Corp., 1924, 202 N.W. 236, at Page 239, 200 Iowa 25, 41 A.L.R. 495.

Rioux v. Employers Liability Assurance Corporation 1936, 187 A. 753, 134 Me. 459.

Merchants Mutual Casualty Company v. Pinard, 1936, 183 A. 36, 87 N.H. 473.

The other line of authority holds that by reason of his ownership interest the owner necessarily has permission for any use.

Sutcliffe v. American Lumbermens Mutual Casualty Company of Illinois, C.C.A.N.Y. 1940, 115 F 2d 410, Certiorari denied, 61 S. Ct. 442, 311 U.S. 420, 85 L. Ed. 469.

Ocean Accident & Guarantee Corporation v. Bear, 1930, 125 So. 675, 220 Ala. 491.

American Auto Ins. Co. v. Powers, 1939, 289 N.W. 170, 291 Mich. 306.

Steinrock v. Hartford Accident & Indemnity Co. 1935, 178 A. 806, 115 N.J.L. 180.

It is submitted that the parties to the insurance contract have the right to agree that, irrespective of ownership, the named insured may grant or withhold coverage by granting or withholding permission to use the described automobile. If such intent is evidenced by the provisions of the policy —if the policy does not expressly make ownership a condition precedent to the right to give permission, the user of the automobile should be covered if express or implied permission is found to exist.

On the other hand, it would seem more plausible to contend that both parties to the contract intended that "permission" should mean the consent of the owner of the automobile. However, such intent must be made evident by the contract itself. The author is of the opinion that the existence of such intent cannot clearly be spelled out from the policy provisions. The insurer might well have expressed such intent by stating in the "Definition of 'Insured'" clause ***** provided the actual use of the automobile is with the permission of the named insured owner of the automobile." In any event, strictly and technically, mere passage of title to the transferee cannot be said to negate permission on the part of the transferor with regard to the use of the automobile. Rather, it seems logical to say that every transfer of ownership (especially where possession is also transferred) carries with it an inherent consent to exercise the rights incident to ownership, including the right to use.

Report Of Committee On Aviation Insurance Law

SUBSEQUENT to the publication in the July, 1945 issue of the Journal of the 1945 report of your Committee on Aviation Insurance Law, it proved impossible to hold the annual convention of the Association. The round table program prepared could, therefore, not be held. However, two of the papers, "Pending Federal and State Legislative Proposals and Their Effects Upon Aviation Insurance if Enacted," by J. J. Magrath, vice president, Chubb & Sons, 90 John Street, New York, N. Y., and "Life and Accident Insurance Coverage of Aviation Risks," by E. J. McAlenney, attorney, and R. T. Sexton, assistant secretary, Connecticut General Life Insurance Company, 55 Elm Street, Hartford, Conn., were published in the October number of the

Journal. We trust that these papers proved of real value to the members of the Association.

Your committee has, due to travel conditions, been unable to hold meetings this year. The members of the committee, however, have been in touch with each other by correspondence and are arranging a round table meeting as a part of the September convention program. Our plans are sufficiently developed at this time to assure a successful round table.

We have arranged for the following papers:

(1) "The Trial of Aviation Accident Cases," by Forrest A. Betts, Title Insurance Building, Los Angeles 13, Calif., a vice president of the Association; Discussion Leader, George W. Orr, United States Aviation Underwriters, 80 John Street, New York 7, N. Y.

(2) "Aviation Insurance from the Buyer's Standpoint," by Hayes Dever, secretary, Pennsylvania-Central Airlines Corporation, Washington National Airport, Washington 25, D. C., discussion leader to be announced.

(3) "A Review of Recent Aviation Decisions," by Charles S. Rhyne, 730 Jackson Place, N. W., Washington, D. C.; discussion leader to be announced.

No legislation has been enacted by Congress since our last report which materially affects aviation insurance, nor is your Committee aware of the passing of any state legislation of importance. The legislative proposals discussed in our last year's report dealing with the liability of air carriers are still pending. These proposals are, of course, of the greatest interest and importance to aviation insurance companies and their counsel.

There have been during the past year a number of important court decisions affecting aviation, a portion of them having a direct bearing upon aviation insurance. Since, however, these decisions are to be competently reviewed at our contemplated round table meeting, no analysis of them is incorporated in this report.

Aviation insurance is both new and of comparatively limited extent, there having been as of January 1, 1945 but 21,893 certificated civil aircraft in the whole United States. The number of such aircraft has, of course, grown by leaps and bounds since that date. As compared to the millions of licensed automobiles and the millions of items of other property at risk under other types of insurance coverage, there is as yet but a small spread of aviation insurance coverages and a correspondingly limited loss experience. There is, therefore, no very considerable body of decisions interpreting aviation insurance policies or involving aviation insurance losses. The time has, therefore, hardly yet arrived for the type of study of decided cases which has been so successfully carried on by other committees of this Association, dealing with other types of insurance coverage, collecting the authorities interpreting the policies involved in these types of coverage.

There is, of course, no industry which is presently so dynamic and challenging as aviation. Airline passengers increased from 1,876,000 in 1939 to 7,700,000 in 1945. Civilian student pilot certificates increased from 30,000 in 1939 to 70,000 in 1945. The Congress has recently enacted a bill providing funds for a nation-wide airport program on a large scale. The Civil Aeronautics Board but recently discovered that there are no less than 2,370 non-scheduled carriers operating 5,529 aircraft, and that there are in all 4,630 companies known to be conducting miscellaneous commercial flying operations. The makers of small airplanes envisage an unprecedented demand for their product from air-minded individuals in all parts of the country.

American insurance has never failed to meet new opportunities presented by the emergence and growth of new businesses. It is certain, therefore, that aviation insurance, already one of the most rapidly growing branches of the business, has a great future, rightly challenging the interest of all members of the Association.

Respectfully submitted,
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Report Of Committee On Casualty Insurance Recovery in Wrongful Death Actions

THE purpose of this report is to give the statutory authority, if any, creating wrongful death actions in various states of the United States, and to call attention to judgments which have been sustained for wrongful death, particularly as to the amount in various relationships. This report will take up each state separately, giving a brief outline of the points covered, followed by a notation as to some of the cases relating thereto. It is not intended to be a complete annotation of all cases in such states upon the various points presented and omits many points involved in wrongful death actions, such as questions of evidence and procedure.

Your Committtee has exhaustively covered all of the cases relating to the question of damages, as well as the other phases in connection with wrongful death actions, but due to the voluminous amount of material gathered it has been necessary to condense the report to the following size. In doing so, many valuable features have necessarily been eliminated, such as the citation of the cases referred to and the year in which they were decided and the exact statutory provisions in each state.

Your Committee desires to particularly emphasize the fact that the presentation of the cases is necessarily only a cross section of the cases in any certain state and each case has many factors that are not presented in this review. However, an effort has been made to refer to the cases that are representative of the general group, and specifically, to all cases that have approved large verdicts. In preparing this report, our attention has been directed to the obvious feature of wrongful death verdicts which is the fact that in recent years the size of the verdicts has substantially increased and the attitude of the higher courts towards larger verdicts has been one of finding substantial verdicts not to be excessive. Of course, this point is not so noticeable in the sixteen states that have a limitation as to the amount of the verdict allowable in a wrongful death action.

Your Committee has on hand the complete data obtained in the preparation of this report, including the citations, and if it is deemed of sufficient interest, this article can be supplemented with additional material.

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ALABAMA

Action:

Statutory authority is contained in the Code of Alabama 1940, Title 7, Sections 119 and 123.

Parties:

In the event of the death of a minor child, action lies by the father or mother or if they decline, by the personal representative. In all other cases, action lies by the personal representative for wrongful death.

Maximum Damages:

There is no statutory limitation.

Statute of Limitations:

Two years.

Damages:

The statutory right to action provides that the action is punitive in nature rather than compensatory. In assessing damages the jury should consider the enormity of the wrong and the necessity of preventing similar wrongs. Although the action has been considered criminal in nature and

damages punitive, the courts have held liability insurers covering the parties charged with the wrongful acts to be liable because of the insurer's voluntary obligation to pay the judgment rendered. The action does not abate on the death of the defendant but may be revived against his personal representative.

Awards Sustained, Reduced or Held Inadequate:

(1) *Where Decedent is a Husband:* $15,000.00 was held not to be excessive in two cases where a widow and children survived.

(2) *Where Decedent is Minor Child*: $15,000.00 was held not to be excessive for the death of a 15-year-old boy; $15,000.00 was upheld where a minor son was killed.

ARIZONA

Action:

Statutory authority for wrongful death action is covered by Arizona Code Annotated, 1939, Chapter 31, Section 102.

Parties:

The action must be brought by the personal representative; if he fails to sue in ninety days or there is no estate, it may be brought by the surviving spouse.

Maximum Damages:

There is no statutory limitation.

Statute of Limitations:

Two years.

Awards Sustained, Reduced or Held Inadequate:

(1) *Where Decedent is a Husband*: A verdict of $17,000.00 for the death of a mine motorman 32 years of age, who left a wife and two children and was earning $165.00 a month, was held not excessive; a verdict of $12,500.00 for the death of a husband 41 years of age who was a carpenter in good health was held not excessive; a recovery of $5,000.00 for the death of a mine engineer aged 62 years earning $100.00 a month was held not excessive; an award of $5,000.00 for the death of a mining engineer 27 years of age earning $100.00 a month was held not excessive.

(2) *Where Decedent is a Minor*: A verdict of $4,800.00 for the death of a 4½-year-old boy was not excessive; a verdict of $3,000.00 for the death of a 19-year-old boy earning $3.00 a day was not excessive; a verdict of $18,750.00 to the parents of a deceased son was held not excessive.

(3) *Where Decedent is Adult Child*: An award of $250.00 for the death of a 21-year-old boy was held inadequate.

ARKANSAS

Action:

Statutory authority for wrongful death action is found in Pope's Arkansas Statutes, Sections 1273, 1275, 1276 and 1277. The action for wrongful death dies with the wrongdoer. However, an action for the injury which caused the death survives both the death of the injured person and the death of the wrongdoer.

Parties:

The action must be brought by the personal representative of the deceased for the benefit of the widow or next of kin.

Maximum Damages:

No statutory limitation.

Statute of Limitations:

Two years.

Awards Sustained, Reduced or Held Inadequate:

(1) *Where Decedent is Husband:* $14,355.00 reduced to $12,000.00 where it was determined that $12,000.00 would buy an annuity equal to decedent's contribution to his family; $25,000.00 held excessive and reduced to $15,000.00 for the death of a 26-year-old man earning $45.00 a week; $4,222.00 for pain and suffering of deceased, who lived fifteen minutes after the injury, declared excessive and reduced to $2,500.00.

(2) *Where the Decedent is Minor Child*: $5,000.00 held not excessive in the death of 18 months old child; $16,000.00 held excessive by the amount of $11,000.00 to the parents of each of three boys; $5,000.00 held grossly excessive for the death of a 7-year-old girl.

(3) *Where Decedent is Adult Child*: Deceased was 23-year-old man aiding his crippled mother on a farm and $5,000.00 was held not excessive; however, the $5,000.00 was held excessive and a remittitur in the amount of $2,500.00 ordered where the deceased was a 21-year-old son contributing nothing to the support of his father.

CALIFORNIA

Action:

Statutory authority contained in California Code of Civil Procedure, Sections 377 and 340.

Parties:

The action may be brought either by all of the heirs or the personal representative on behalf of the heirs.

Maximum Damage:

There is no limitation as to amount.

Statute of Limitations:

One year.

Damages:

Funeral expenses are recoverable and there is a conflict of authority as to whether medical expenses and hospitalization charges incurred prior to death are recoverable in the action.

Awards Held Inadequate:

An award of $2,500.00 for the death of a 24-year-old husband who left a wife and child, was held to be grossly inadequate; a verdict of $1,000.00 was held inadequate where the deceased left a wife and two children and was earning $33.00 a week and had a life expectancy of 35 years.

Awards Held Excessive:

(1) *Where Decedent is a Husband*: An award of $40,000.00 for the death of a road worker aged 59, leaving a wife and eight children, earning $36.00 a week, held excessive and reduced to $25,000.00.

(2) *Where Decedent is a Minor Child*: An award of $20,000.00 held excessive for the death of a girl two years old; an award of $6,000.00 held excessive for the death of a boy 4½ years old; an award of $10,000.00 held excessive for a boy 6 years old; an award of $1,500.00 held excessive for the death of a son 20 years old; an award of $3,280.00 for a mother for the death of an 18-year-old son, reduced to $1,000.00 where it was shown that the son had contributed to her support; an award of $40,000.00 was reduced by the trial court to $18,000.00, was held excessive and reduced by the Appellate Court to $10,000.00 to a father for the death of his 17-year-old son, who assisted the father in work.

(3) *Where Decedent an Adult Child*: Verdict of $6,000.00 for death of 27-year-old son held excessive; verdict of $30,000.00 held excessive and reduced to $12,000.00 for death of a 47-year-old son of 70-year-old parents; an award of $3,500.00 for the death of a 35-year-old son suffering from an incurable disease and unable to work, held excessive to his parents; an award of $10,000.00 to the mother for the death of an adult daughter who acted as nurse and housekeeper held excessive; award of $6,000.00 reduced to $4,500.00 to a 79-year-old mother for the death of her daughter.

Awards Upheld As Not Excessive:

There have been many cases under this category passed on by the California courts. Those where awards are typical and where substantial verdicts have been upheld as being not unreasonably large will be hereafter referred to, to show the trend.

(1) *Where Decedent is a Husband*: An award of $12,000.00 for a 44-year-old physician upheld; an award of $17,000.00 for a 44-year-old man earning $3.00 a day, upheld; an award of $12,000.00 upheld for a 26-year-old decedent earning $75.00 a month leaving a wife and child; an award of $30,000.00 upheld for the death of a locomotive engineer leaving a wife and two minor children; an award of $20,000.00 upheld for the death of a real estate broker, aged 57 years, earning $200.00 a month; award of $20,000.00 upheld for death of man earning $3.50 a day, life expectancy of 33 years, leaving a widow and four children; award of $35,000.00 for the death of a man 42 years old, earning $5,000.00 yearly, leaving a wife and children, upheld; verdict of $20,000.00 for the death of a 25-year-old man earning $20.00 a week upheld; award of $20,000 for the death of a 31-year-old truck driver leaving a wife and two children, earning $150.00 a month upheld; an award of $17,000.00 to a widow and minor children upheld; an award of $12,500.00 for the death of a Chinese father, 60 years old, upheld; a verdict of $50,000.00 held not excessive for the death of a 37-year-old man, earning $160.00 a month, supporting a wife and two minor children; $15,000.00 upheld for death of married man leaving a wife and ten children; $25,000.00 upheld for death of married man earning $250.00 a month, with expectancy of 21 years; $30,000.00 upheld for death of a switchman earning $200.00 a month with an expectancy of 25 years,

leaving wife and three children; $30,000.00 upheld for the death of a 49-year-old husband earning $260.00 a month; $12,500.00 upheld for the death of a 57-year-old husband earning $150.00 a month, leaving a widow.

(2) *Where Decedent is a Wife*: Verdict of $14,000.00 held not excessive where a wife has an expectancy of 31 years and leaving minor children; a verdict of $14,000.00 held not excessive for the death of a wife leaving a husband and four minor children; $30,000.00 upheld for the death of 40 year old wife and mother of four children under age; $15,000.00 upheld for the death of a 40 year old wife leaving a husband and three children; $20,000.00 upheld for the death of a 30 year old wife leaving a husband and three small children; $12,000.00 held not excessive for the death of a 56 year old married woman in an action by her husband and two adult children; $14,000.00 upheld for the death of a 63 year old woman survived by a husband and seven adult children.

(3) *Where Decedent is a Minor Child*: $10,500.00 upheld in an action by the father for the death of five minor children ranging from five to sixteen years; $10,000.00 for the death of a seven-year-old son upheld; $35,000.00 for the death of a 15-year-old boy earning $50.00 a month upheld; $10,000.00 to the father for the death of a 14-year-old son assisting him in his business held not excessive; $9,275.00 for the death of an 18-year-old boy upheld; $10,000.00 to a mother for the death of a 6-year-old son upheld; $12,000.00 for the death of an 18-year-old son, who assisted in support of the family upheld; $10,000.00 awarded to a father for the death of a 17-year-old daughter held not excessive.

(4) *Where Decedent is an Adult Child*: An award of $10,000.00 in favor of a mother for the death of a 23-year-old son who assisted in her support upheld; $12,000.00 held not excessive to a mother for the death of an adult son; an award of $15,000.00 to a mother whose life expectancy was 13 years at the time of the death of her 33-year-old son held not excessive.

COLORADO

Action:

Statutory authority for wrongful death action is contained in the 1935 Colorado Statutes Annotated, Chapter 50, Sections 1, 2, 3 and 4.

Parties:

The action may be brought by surviving spouse, but if he fails to sue within one year or there is none, then the action lies with the heirs.

Maximum Damages:

Recovery is limited to $5,000.00, interest is allowable for the period from the time of filing of the action to the date of judgment. In the case of the death of a passenger on a public conveyance, the carrier shall forfeit not to exceed $5,000.00 and not less than $3,000.00.

Statute of Limitations:

Two years.

Damages:

Funeral expenses are recoverable in the action.

Awards Sustained, Reduced or Held Inadequate:

(1) *Where Decedent is a Husband*: Awards of $5,000.00 have been sustained in several cases for the death of a husband who was living with and supporting a wife and family.

(2) *Where Decedent is a Wife*: A verdict of $4,000.00 was sustained for the death of a 23-year-old wife, earning $400.00 per year.

(3) *Where Decedent is a Minor*: A verdict of $5,000.00 for the death of a 19-year-old boy was held not to be excessive.

(4) *Where Decedent is a Father*: Verdict of $4,000.00 was held to be excessive for the death of a 68-year-old father, who had an accumulated estate of $6,400.00 and whose annual net earnings amounted to $1,000.00.

CONNECTICUT

Action:

Wrongful death statute is contained in 1937 Supplement to the Connecticut General Laws of 1930, Section 852 (d).

Parties:

Action must be brought by the personal representative for the benefit of the heirs of the estate.

Maximum Damages:

Limited by law to $20,000.00.

Statute of Limitations:

One year after the commencement of the act causing the death.

Damages:

The damages include compensation for deceased's pain and suffering, his medical and hospital bills, but not funeral expenses. The rule is set forth that it is that sum which would have compensated the deceased so far as money could do, for the destruction of his capacity to carry on gainful activities as he would have done had he not been killed, including the destruction of his earning capacity. The number of next of kin, expectancy of life, etc. has no bearing on the amount of damages.

The following are illustrative of cases on maximum recoveries permitted:

Where the decedent was 74 years old, earning $65.00 a month, a verdict of $4,500.00 held not excessive, to the estate; where decedent a boy, aged 12, and verdict had been reduced from $7,500.00 to $5,000.00, the latter sum held not excessive; $5,000.00 upheld for the death of an eight year old boy; $10,000.00 held not excessive for the death of a 24-year-old woman, the mother of two children; $5,000.00 upheld for the death of a man 28 years old earning $18.00 a week.

DELAWARE

Action:

The death action of DELAWARE is found in the Delaware Revised Code, Chapter 127, Sections 4636, 4637, and 4638, and Delaware Laws of 1941, Chapter 231, Section 1.

Parties:

Right of recovery is given to the widow or widower and if none, to the personal representative.

Maximum Damages:

There is no statutory limitation on the amount.

Statute of Limitations:

There is no limitation of time within which the action for death must be brought.

Damages:

In upholding a verdict of $3,625.00 for the death of a boy, the Delaware Court states the rule of measure of damages for death in that State as follows: "The measure of damages is the sum which the jury may believe from the evidence the deceased would probably have earned during his lifetime and would have saved from his earnings and left as his estate, and which would have gone to his next of kin. In determining this sum, the jury should be governed by the reasonable rules governing human experience in the acquisition and retention of property under the circumstances and environment surrounding such a life as was that of the deceased."

FLORIDA

Action:

Statutory authority for wrongful death action is contained in Florida Statutes Annotated, Sections 768.01-768.04.

Parties:

Action is maintained by the surviving spouse; if none, children; if none, dependents; if none, executor or administrator. The action survives from one class to another.

Maximum Damages:

There is no limitation on the amount of recovery.

Statute of Limitations:

Two years.

Awards Sustained, Reduced or Held Inadequate:

(1) *Where Decedent is Husband*: A verdict of $15,000.00 was reduced to $8,000.00; a verdict of $10,000.00 for death of a 31-year-old man earning $35.00 a week was held not excessive; verdict of $15,000.00 for death of a brakeman was held excessive by $6,000 in view of the evidence indicating the deceased was negligent.

(2) *Where Decedent is Wife*: A verdict of $10,670.00 was held not excessive.

(3) *Where Decedent is Mother*: A verdict of $15,000.00 was held excessive by $2,500.00 for the death of a 36-year-old mother with limited earning capacity who supported her minor child.

(4) *Where Decedent is Minor Child*: Verdict of $4,000.00 for the death of a 12-year-old son not excessive; verdict of $8,000.00 to a father for death of 10-year-old son not excessive; verdict of $1,000.00 to an administrator for death of 10-year-old child not excessive; verdict of $10,-

000.00 held excessive and reduced to $7,000.00 to widow for death of her 16-year-old son; verdict of $10,000.00 reduced to $6,000.00 in action by parents for death of minor child.

(5) *Where Decedent is Adult Child*: A judgment awarding deceased's dependent mother and brother $6,500.00 held not excessive.

GEORGIA

Action:

Statutory action is covered by Georgia Code 1933, Sections 10-1302 to 1309.

Parties:

The widow, or if there be no widow, the children, may recover for the death of the husband or father; the surviving husband, together with children, if any, may recover for the death of the wife or mother; the mother, or if there be no mother, the father, may recover for the death of a child who contributed to support and who left no widow, husband or child; otherwise, the executor or administrator. The action is brought for the benefit of the heirs-at-law.

Maximum Damages:

There is no statutory limitation.

Statute of Limitations:

Two years.

Damages:

Recovery may be had for funeral and medical expenses.

Awards Sustained, Reduced or Held Inadequate:

(1) *Where Decedent is Husband:* $15,000.00 was sustained for the death of a 38-year-old husband.

(2) *Where the Decedent is Wife*: $15,000.00 was upheld for the death of a wife who left surviving a husband and children.

(3) *Where Decedent is Minor Child*: $50,000.00 upheld in an action by the father on the death of a son, whose age is not stated; $15,708.00 upheld in an action by the mother of her 12-year-old son.

IDAHO

Action:

Statutory authority is found in the Idaho Code, 1932, Section 5-311, and 5-219.

Parties:

The action may be brought by the heirs or personal representative of the decedent.

Maximum Damages:

There is no statutory limitation.

Statute of Limitations:

Two years.

Damages:

Medical and hospital expenses incurred before death and funeral expenses are recoverable.

Awards Sustained, Reduced or Held Inadequate:

(1) *Where Decedent is Husband*: A verdict of $15,000.00 for a widow and two minor children was held not excessive for a husband 32 years old earning $85.00 a month; award of $15,000.00 was held not excessive for the death of a husband who was the father of four minor children; an award of $9,000.00 to decedent's widow and children was held not excessive.

(2) *Where Decedent is Wife*: A verdict of $10,000.00 to a husband for the wrongful death of a 54-year-old wife who had been crippled for 25 years was held not excessive.

(3) *Where Decedent is a Minor Child*: A verdict of $2,000.00 for the death of a child four years old was not excessive; an award of $4,000.00 in favor of a father 61 years of age for the death of a 7-year-old boy was held not excessive; an award of $10,000.00 for the death of a 9-year-old girl was not excessive; an award of $45,468.00 for the death of an 18-year-old son who contributed to his parents' support was held not excessive.

(4) *Where Decedent is an Adult Child*: An award of $2,500.00 for the death of an adult daughter contributing $5.00 weekly to the support of parents was not excessive.

(5) *Where Decedent is a Father*: An award of $8,500.00 to a minor for the death of his father, aged 30, earning $150.00 a month, was not excessive; an award of $23,535.00 to three minor children for the death of a father 36 years of age earning 55c an hour at the time of his death was held not excessive.

ILLINOIS

Action:

Statutory authority for an action for wrongful death is contained in Smith-Hurd's Illinois Revised Statutes 1937 (1) paragraph 2, chapter 70.

Parties:

Action must be brought by the personal representative for the exclusive benefit of the widow and next of kin of such deceased person.

Maximum Damages:

Limited by statute to $10,000.00.

Statute of Limitations:

One year after the death of such person.

Damages:

No recovery is allowed for pain and suffering of the deceased, expenses incurred or paid for medical attendance nor for loss of earnings while disabled prior to death.

Awards Sustained, Reduced or Held Inadequate:

(1) *Where Decedent is Husband*: A verdict of $5,500.00 for the death of a 47-year-old laborer leaving a wife, was held not excessive; a verdict of $7,000.00 for a 63-year-old mailman earning $1,800.00 a year not excessive; a verdict of $10,000.00 for a 31-year-old railroad worker leaving a wife and four children not excessive; a verdict of $10,000.00 for a 46-year-old man earning $3,000.00 a year and leaving a wife and three children not excessive; $2,500.00 was affirmed for the death of a 62-year-old painter who was separated from his wife and children, who were on relief; $7,500.00 for the death of a 44-year-old man leaving a wife and family was held not excessive.

(2) *Where Decedent is Wife*: $7,500.00 was held not excessive where deceased was 29 years old and left a husband and was a housewife.

(3) *Where Decedent is a Minor Child*: $6,772.00 was held not excessive for the death of a boy 18 months old; $10,000.00 was held not excessive for the death of a 10 year old boy leaving surviving parents and sisters; $8,500.00 was held not excessive for the death of a 19-year-old boy who had contributed $5,000.00 for three years prior to his death, to his father; $3,500.00 was held not excessive for the death of a 17-year-old girl attending business school and living at home with her mother; $5,000.00 was held not excessive for the death of an 11-year-old girl living at home; $7,500.00 was affirmed for the wrongful death of a boy of high school age; $5,000.00 was held not excessive for the death of an 18-year-old farm boy; $500.00 for the wrongful death of a 13-year-old boy who left a father and mother and sister was held inadequate; judgment of $300.00 for the death of a child was not set aside for inadequacy where neglect of defendant was questionable.

(4) *Where Decedent is Mother*: $4,000.00 for the death of a 44-year-old woman was held not excessive though there was no evidence of pecuniary loss; $4,000.00 for the death of a 58-year-old woman was held not excessive in an action brought by her son, where it was shown she did work in the family of her son; a verdict of $5,000.00 to a son for the death of a 75-year-old mother who earned nothing, was held excessive and reduced to $2,000.00.

(5) *Where Decedent is an Adult Child*: $4,000.00 for the death of a 29-year-old unmarried man held not excessive; $6,000.00 held not excessive for the death of a 21-year-old truck driver who contributed to the support of his parents; $3,650.00 was affirmed for the death of a 31-year-old deaf and dumb W.P.A. employee, who paid living expenses of his aged mother.

INDIANA

Action:

Statutory authority in wrongful death actions is contained in the Annotated Statutes, 1933, Section 2-404.

Parties:

The action must be brought by the personal representative for the benefit of the spouse and children, if any, or next of kin.

Maximum Damages:

Statutory limitation for $10,000.00. If there is no surviving spouse or dependent children, or dependent next of kin, the measure of damages equals medical, funeral and administration expenses, not exceeding $1,150.00.

Statute of Limitations:

Two years.

Damagess

Expenses of funeral services and the reasonable cost of medical services may be recovered in the death action.

Awards Sustained, Reduced or Held Inadequate:

(1) *Where Decedent is a Husband*: $10,000.00 for the death of a brick mason 33 years old earning 62½c an hour was held not excessive; $10,000.00 for the death of a 21-year-old truck driver earning $71.00 a month held not excessive; $7,500.00 for the death of a man earning $95.00 a month with an expectancy of 18 years held not excessive; $5,000.00 for the death of a 68-year-old man earning $1,200.00 a year and survived by a widow and four sons held not excessive; $1,000.00 for the death of a 34-year-old man earning $25.00 a week survived by a widow and three children held not inadequate.

(2) *Where Decedent is a Wife*: $7,500.00 held not excessive for the death of a wife who was the mother of three children and did all of the housework and had a life expectancy of 26 years; $8,000.00 for the death of a 28-year-old wife and mother of two minor children and earning $12.00 a week held not excessive.

(3) *Where Decedent is a Minor Child*: $5,000.00 for the death of a 16-year-old boy contributing earnings to the family consisting of a mother and two sisters held not excessive; $3,400.00 for the death of a 12-year-old girl in good health held not excessive; $8,000.00 for the death of a 3½ year old child held excessive; $2,500.00 for the death of a 20-year-old boy who assisted his father in business held not excessive.

IOWA

Action:

Wrongful death action covered by statute, Iowa Code, 1935.

Parties:

The action may be maintained by the administrator or executor of decedent or a parent may maintain an action for wrongful death of infant child and recover for loss of services. The action is for the benefit of the wife or husband and children, or, if neither of them, then parents and next of kin of decedent.

Maximum Damages:

No statutory limitation.

Statute of Limitations:

Within two years after cause of action accrued.

Damages:

Funeral expenses and medical and hospital expense. Funeral expenses are not recoverable, but nursing, medical and hospital expenses are included as element of damages.

Awards Sustained, Reduced or Held Inadequate:

(1) *Where Decedent is Husband*: $3,500.00 upheld for 36-year-old husband leaving wife and child; $3,960.00 upheld for 43-year-old husband; $14,500.00 upheld for husband leaving wife and two sons; $10,000.00 upheld for 23-year-old man leaving one son; $15,000.00 sustained for 54-year-old carpenter; $12,000.00 sustained for 34-year-old married man.

(2) *Where Decedent is Wife*: $7,000.00 upheld for 47-year-old wife leaving husband and six children; $3,820.00 upheld for 65-year-old housewife.

(3) *Where Decedent is Minor*: $14,500.00 reduced to $10,000.00 for the wrongful death of 18-year-old college student; $1,000.00 verdict for 14-year-old daughter held not excessive.

KANSAS

Action:

Statutory authority contained in the General Statutes of Kansas, 1935, Section 60-3203, and 60-3204.

Parties:

Action may be brought by the personal representative; if none, the widow; if none, the next of kin.

Maximum Damages:

There is a maximum limitation of $10,000.00.

Statute of Limitations:

Two years.

Damages:

Medical and hospital expenses incurred before death and funeral expenses for the decedent are recoverable in the action.

Awards Sustained, Reduced or Held Inadequate:

(1) *Where Decedent is Husband*: Verdicts have been held not excessive for

deaths of husbands in the following amounts: $7,830.00, $8,000.00, $9,000.00, $1,250.00, $10,000.00, $10,000.00, $10,000.00. Due to the statutory limitation being $10,000.00 verdicts approaching and equaling that amount have been quite common in Kansas. Verdict of $6,150.00 to a widow for the death of her 77-year-old husband who earned $24.00 a week was held to be excessive and reduced to $4,650.00.

(2) *Where Decedent is Minor Child*: Judgment of $3,000.00 for a minor 11 years of age was held not excessive; verdict of $10,000.00 was reduced to $6,000.00 in an action for the death of a 19-year-old son earning $1.75 a day; $6,305.00 for the death of a 7-year-old girl was held not to be excessive; a verdict of $10,000.00 to a mother for the death of her son was held excessive because there was no showing of pecuniary loss.

(3) *Where Decedent is Adult Child*: An award of $10,000.00 for the death of a young woman contributing to the support of her mother was held excessive and reduced to $6,000.00 in view of the statutory provision limiting judgment to $10,000.00; a verdict of $4,500.00 for the death of a 34-year-old brakeman in favor of his mother, who was a widow was held not excessive; $6,000.00 for the death of a 23-year-old son was held not excessive; $5,000.00 for the death of a 33-year-old son earning $1,000.00 a year was not excessive.

(4) *Where Decedent is Wife*: An award of $10,000.00 for the death of a wife 31 years of age in good health and the mother of two children was held not excessive.

KENTUCKY

Action:

Statutory authority is found in the Kentucky Constitution, Section 241 and Section 54 and in Baldwin's 1936 Revision and in Baldwin's Kentucky Revised Statutes, 1942, Section 411.130. The action survives the death of the responsible party except in cases of assault where there is no survival of the right of action.

Parties:

The action must be brought by the personal representative for the benefit of the spouse, children or parents of the deceased. If there are none, then the amount recovered is to be part of the estate of the deceased.

Maximum Damages:

There is no statutory limitation, and the Constitution denies the General Assembly the power to limit recoveries in wrongful death cases.

Awards Sustained, Reduced or Held Inadequate:

(1) *Where the Decedent is a Husband*: Verdict of $30,000.00 where the deceased was a 32-year-old laborer who left a widow and one child; a verdict of $25,000.00 was held not excessive where the decedent was a young man earning $200.00 a month.

(2) *Where the Decedent is a Minor*: A verdict of $15,000.00 was held not excessive where the deceased was a boy 20, earning $3.50 per day; the court upheld a verdict in the amount of $20,000.00 where the deceased was a 19-year-old boy earning $4.00 a day.

LOUISIANA

Action:

Statutory authority for wrongful death action is contained in the Louisiana Civil Code of 1932, 1935 Pocket Part, Article 2315.

Parties:

The action may be brought by the following, in the following order: (1) Surviving spouse or children; if none, (2) Parents; if none, (3) Brothers and sisters.

Maximum Damages:

There is no limitation upon the amount of damages the jury may award.

Statute of Limitations:

One year following the death.

Damages:

It is provided by statute that damages shall include all damages to the decedent in addition to the damages to the plaintiff himself.

Awards Sustained, Reduced or Held Inadequate:

(1) *Where Decedent is Husband*: $15,000.00 was reduced to $10,000.00 in an action brought by the surviving widow: An award of $8,000.00 was held not excessive where the decedent was survived by a widow and children.

(2) *Where Decedent Was the Wife*: $500.00 was held to be adequate in an action brought by the husband where they

had been on bad terms and separated for some time prior to her death.

(3) *Where Decedent is a Minor*: An award of $10,000.00 was reduced to $8,000.00 in an action brought by the parents for the death of a 14-year-old child; an award of $15,000.00 was reduced to $6,000.00 in an action by the surviving parents of the minor child; an award of $5,000.00 was held not excessive where a minor child was survived by his mother.

MAINE

Action:

Statutory authority is contained in the Revised Statutes of Maine, 1944, Chapter 152, Sections 7, 8, 9, 10 and 11, and Chapter 100, Section 50.

Parties:

The right of action is given to the personal representatives for the exclusive benefit of the widow or widower, if no children, and of the children if there be no widow or widower and of both, if there are both. If none of them, then it is for the benefit of the heirs.

Statute of Limitations:

Two years after the death.

Maximum Damages:

Recovery is limited to $10,000.00.

Damages:

The measure of damages is the pecuniary injuries resulting from the death, reasonable expenses of medical, surgical and hospital care and treatment and reasonable funeral expenses.

Awards Reviewed:

$3,600.00 was held excessive for the damage sustained by two very old people whose adult son was killed; $1,000.00 was held not excessive for the death of a minor child.

MARYLAND

Action:

Statutory authority is contained in Flack's Annotated Code of Maryland, 1939, Article 75, Sections 29 and 30, Article 67, Section 1, and Article 93, Section 109.

Parties:

The personal representative may recover for the personal injuries before death, the expenses in connection with the injuries and up to $300.00 for funeral expenses. For the death, the Estate recovers for the benefit of the wife, husband, parent and child.

Statute of Limitations:

Twelve calendar months. If the defendant has died, the action must be brought within six calendar months after the death of the defendant.

Maximum Damages:

There is no limitation as to amount.

Awards Reviewed:

Under the rule in Maryland, the Court of Appeals cannot deal with the matter of excessive damages. The only remedy for excessive damages is with the lower court, or on motion for new trial.

MASSACHUSETTS

Action:

Statutory authority is found in the Massachusetts General Laws, 1943, Chapter 444, Section 1, 1941, Chapter 460, Section 1, 1941, 1887, Chapter 270, Section 2, 1937, Chapter 406, Section 3, 1939, Chapter 451, Section 62, 1941, Chapter 504, Section 4.

Parties:

The action must be brought by the personal representative for the use of the wife or husband if there be no children; if the deceased leaves a spouse and children, then one-half to each; if the deceased leaves no spouse, then to the use of the next of kin.

Maximum Damages:

The damages shall be not less than $1,000.00 and not more than $10,000.00.

Statute of Limitations:

Two years.

Damages:

Damages may be recovered under a separate count for conscious suffering resulting from the same injury. The sum recoverable is in the nature of a penalty to punish the wrongdoer, the damages being assessed with reference to the degree of culpability.

No annotation is made of the amounts awarded in specific cases due to the fact that the damages are based upon the degree of blameworthiness inherent in the fatal act and not as compensation for the loss inflicted.

MICHIGAN

Action:
Wrongful death covered by Section 27.711, Michigan Statutes Annotated.

Parties:
Action is brought by the personal representative for the benefit of the next of kin.

Maximum Damages:
No statutory limitation.

Statute of Limitations:
Three years.

Damages:
Reasonable medical, hospital, funeral and burial expenses for which the estate of decedent is liable, are recoverable. Reasonable compensation for pain and suffering of deceased while conscious, and pecuniary loss by surviving spouse and next of kin.

Awards Sustained, Reduced or Held Inadequate:
(1) *Where Decedent is Husband*: $6,900.00 awarded to a wife for brakeman earning $45.00 per month held in excess; $8,000.00 held excessive and reduced to $5,000.00 where decedent 30 years old earning $450.00 a year and left a wife and seven months' old child; $5,077.38 reduced to $3,403.00, decedent 47 years old in poor health and earning only $42.00 per month, leaving a widow; $6,286.00 reduced to $3,000.00 where decedent left a family, but had not contributed to their support; $11,000.00 sustained for death of a 40-year-old man.

(2) *Where Decedent is Wife*: $3,000.00 held not excessive where decedent wife was 47 years old and three minor children; $8,535.00 sustained for childless wife earning $30.00 a week; $7,000.00 sustained for wrongful death of wife where husband had remarried eleven months after her death.

(3) *Where Decedent is Minor Child*: $20,000.00 reduced to $15,000.00 for 16-year-old boy; $7,487.00 reduced to $2,500.00 for 15-year-old boy earning 75c a day; $2,539.00 held not excessive for 4-year-old girl; $650.00 sustained as adequate for death of 15-year-old girl; $2,767.00 sustained for 17-year-old farm boy.

MINNESOTA

Action:
Covered by Section 9657, Mason's Minnesota Statutes, 1944 Supplement.

Parties:
Action is brought by the personal representative for the benefit of the surviving spouses and next of kin.

Maximum Damages:
Statutory limitation of $10,000.00.

Statute of Limitations:
Two years.

Damages:
Funeral expenses and medical and hospital expenses may be recovered as part of damages.

Awards Sustained, Reduced or Held Inadequate:
(1) *Where Decedent is Husband*: $7,500.00 reduced to $6,750.00 where decedent was 56 years old, left wife and children; $500.00 held not inadequate where decedent was 74 years old, leaving wife; $7,500.00 sustained where decedent contributed $250.00 a month to his wife; $7,500.00 sustained where decedent was 48 years old, leaving young children; $10,000.00 sustained for death of surgeon with expectancy of 17 years earning $5,000.00 a year; $6,575.00 sustained for 46-year-old decedent supporting wife and six children.

(2) *Where Decedent is Wife*: $3,000.00 sustained for wife and mother with ten-year life expectancy.

(3) *Where Decedent is Father*: $5,000.00 held excessive and reduced to $3,000.00 where decedent was 76 years old, retired and next of kin were adult daughters; $3,750.00 sustained where decedent was 66 years old with five daughters; $5,000.00 held excessive where decedent was 67 years old, left an estate of $73,000.00, and next of kin were financially independent.

(4) *Where Decedent is Mother*: $7,500.00 sustained where decedent was 52 years old with ten children, four of them minors.

(5) *Where Decedent is Minor Child*: Verdict of $3,900.00 reduced to $3,200.00 for 17-year-old boy; verdict of $5,000.00 reduced to $3,000.00 for nine-year-old boy; verdict of $2,564.00 for eight-year-old girl held not excessive, but stated to be considered large; verdict of $5,057.00 held not excessive for 18-year-old daughter who was

the only child of parents in middle age; verdict of $6,000.00 sustained for death of 19-year-old daughter who worked at home as maid; verdict of $6,250.00 sustained for 15-year-old boy.

(6) *Where Decedent is Adult Child*: Verdict of $6,000.00 sustained for 23-year-old woman who lived at home and assisted in her father's grocery; verdict of $2,800.00 sustained for daughter contributing to the support of her mother; verdict of $7,500.00 sustained for death of 27-year-old man earning $80.00 per month and contributing the same to his parents; verdict of $5,500.00 sustained for death of 28-year-old woman supporting her mother.

(7) *Where Decedent is Grandchild*: Verdict of $3,240.00 sustained where decedent 23 years old leaving grandmother as his next of kin.

MISSISSIPPI

Action:

Statutory authority is contained in the Mississippi Code, 1930, Section 510.

Parties:

The action may be brought by the personal representative for the benefit of all parties entitled to recovery or by the following persons individually in the following order, which is the order in which they are entitled to recovery:

(a) Wife, husband and/or children;
(b) Father, mother, brother or sister;
(c) Legal representative for the benefit of the estate of the decedent in general.

Maximum Damages:

There is no statutory limitation on damages.

Statute of Limitations:

One year following the day of death.

Damages:

The jury may take into consideration all of the damages of every kind to the decedent and all of the damages of every kind to any person interested in the suit. The life expectancy of the decedent is not an element of damages and the poverty of the plaintiff is not admissible in determining the damages. Contributory negligence of the decedent is not a bar but shall be considered in limitation of damages.

Awards Sustained, Reduced or Held Inadequate:

(1) *Where Decedent is the Husband*: $22,500.00 awarded to a wife and minor children was held not excessive; $10,000.00 awarded to a widow was held not excessive; $2,000.00 awarded to the widow of a laborer earning $4.00 a day was held inadequate.

MISSOURI

Action:

Wrongful death statute is covered by the Missouri Revised Statutes of 1939, Sections 3652, 3653 and 3654.

Parties:

Action may be maintained by the surviving spouse or children and if none, by the personal representative. If the deceased is a minor, the action may be maintained by the parents.

Maximum Damages:

If death is caused by the neglect of a public conveyance, the recovery shall be not less than $2,000.00, nor more than $10,000.00. In all other cases, maximum damages are $15,000.00.

Statute of Limitations:

One year.

Awards Sustained, Reduced or Held Inadequate:

(1) *Where Decedent is Husband*: An award of $10,000.00 was upheld although it was shown that by mathematical computation the deceased's further earnings could not exceed $6,800.00.

(2) *Where Decedent is a Minor*: $5,000.00 verdict was excessive by $2,500.00 where the decedent was a 17-year-old girl survived by her mother; a $5,000.00 verdict was held not excessive where the decedent was an 18-year-old boy contributing $80.00 a month to his parents; a $4,000.00 verdict was excessive by $1,000.00 for the death of a boy 19 years old who contributed $25.00 a week to his parents.

(3) *Where Decedent is Sister*: A $5,000.00 verdict was held not excessive where the decedent was a 55-year-old spinster who lived with her elderly sister and was engaged in a small business.

MONTANA

Action:
Statutory authority is contained in the Montana Revised Codes of 1935, Sections 9076 and 9031.

Parties:
The action must be brought by the heirs or personal representative of the deceased.

Maximum Damages:
No limitation by law.

Statute of Limitations:
Three years.

Awards Sustained, Reduced or Held Inadequate:
(1) *Where Decedent is Husband*: Verdict of $25,000.00 was held not excessive where decedent left a widow and minor children and had a life expectancy of 25 years and earnings of $150.00 per month. In an action by a surviving wife for the death of a 35-year-old husband earning $150.00 per month, $25,000.00 verdict was held excessive and reduced to $15,000.00. A verdict of $40,000.00 was reduced to $15,000.00 where the evidence showed that the deceased left an estate of $70,000.00 to the plaintiff.

(2) *Where Decedent is a Minor*: A verdict of $18,000.00 was not excessive in a mother's action for the death of her minor son. In an action by a father for the death of a 20-year-old son who contributed $20.00 to $60.00 per month toward the family expenses, a verdict of $5,500.00 was held excessive and reduced to $3,000.00; a verdict of $2,500.00 for the death of a boy under seven years of age was held not excessive; a verdict of $15,000.00 for the death of an eight-year-old boy was held not excessive.

NEBRASKA

Action:
Action for wrongful death contained in Revised Statutes of Nebraska, Section 30-809.

Parties:
Must be brought by personal representative of decedent for the benefit of the widow, widower and next of kin.

Maximum Damages:
No statutory limitation.

Statute of Limitations:
Two years after death.

Damages:
Funeral expenses and medical and hospital expenses are included as element of damages.

Awards Sustained, Reduced or Held Inadequate:
(1) *Where Decedent is Husband*: Verdict of $15,000.00 sustained for the death of a man 32 years old earning $150.00 a month; $5,450.00 held not excessive where decedent 53 years of age was survived by wife and five children; verdict of $2,500.00 sustained where deceased 24 years old survived by wife and one small child.

(2) *Where Decedent is Wife*: $10,000.00 sustained for death of 52-year-old woman leaving a husband and three children where wife did all of the housework and educated the children.

(3) *Where Decedent is Minor Child*: $2,400.00 for death of 17-year-old boy earning $4.00 a day sustained.

(4) *Where Decedent is Adult Child*: $1,100.00 held not excessive where deceased was 35 years of age earning $1,800.00 a year and contributed to the support of his mother; $4,500.00 sustained where deceased was a woman having expectancy of 25 years and supported her mother.

NEVADA

Action:
Statutory authority is contained in the Nevada Compiled Laws, 1929, Sections 9195 and 8524.

Parties:
The action must be brought by the personal representative of the deceased.

Maximum Damages:
No limitation.

Statute of Limitations:
Two years.

Awards Sustained, Reduced or Held Inadequate:
A verdict of $10,000.00 for the death of a laborer 30 years old earning $3.00 a day was held to be excessive where he was survived by his parents and there was no showing that he contributed anything to them or that they were in need.

NEW HAMPSHIRE

Action:

New Hampshire Statute is found in Revised Statutes, 2:47-2, 3, and 5.

Parties:

The action must be prosecuted by the personal representative of the decedent for the benefit of the heirs.

Maximum Damages:

Limitation of recovery is $10,000.00 if the decedent leaves a widow, widower, minor child or children, or dependent father or mother. If he left none of these, the maximum award is $7,000.00.

Statute of Limitations:

Action must be commenced within two years from the date of death.

Damages:

The action is in the nature of a survival action. It provides for lump sum recovery, including the damages suffered by reason of death, such as deprivation of opportunity to earn money, had he lived. Funeral expenses are recoverable as well as medical expenses.

The following cases illustrate maximum verdicts allowed:

The decedent, a minor 7 years of age, $4,500.00 was held not excessive; verdict of $5,000.00 for the death of a 21-year-old woman who, at the time of her death, was living with her mother and father, working as a waitress, was held not excessive; the maximum recovery of $10,000.00 for the death of a 31-year-old taxi driver earning $40.00 a week was held not excessive; an award of $7,000.00 for the death of a 66-year-old woman who was a housewife, plus funeral charges, was held not excessive.

NEW JERSEY

Action:

Wrongful death statute is covered by Revised Statutes, 2:47-1 to 6, and Revised Statutes, 2:26-9.

Parties:

An action brought under the Survival Statute must be brought by the personal representative; proceeds become a part of the Estate; action for wrongful death must be brought by the executor and in cases of intestacy, must be brought by the administrator ad prosequendum, any recovery going to the widow and next of kin.

Maximum Damages:

There is no limitation as to damages.

Statute of Limitations:

Actions under the Survival Act must be brought within two years from the date the cause of action accrued. Action for wrongful death must be brought within 24 calendar months after the date of death.

Damages:

The Survival Act is one for damages suffered prior to death and the Wrongful Death Act is for the pecuniary loss suffered by the heirs and next of kin. The damages suffered before death include hospital and medical expenses.

Cases with respect to maximum verdicts are illustrated by the following:

A verdict of $14,500.00 for the death of a husband earning $3,000.00 per year with a life expectancy of 18 years, was held not excessive; a married man 28 years old, leaving a widow 25 years old, earning $3,700.00 a year, held a verdict of $25,000.00 was not excessive; a verdict of $20,000.00 was upheld where the decedent was 33 years old, was a college instructor and left a wife; a verdict of $15,000.00 was upheld where the decedent was 62 years of age, earning $3,500.00 a year, leaving a wife; a verdict of $12,500.00 was held not excessive where the deceased was 24 years of age, earning $30.00 a week, and the father of a five months' old child; a verdict of $6,000.00 was held not excessive for the death of a boy 13, who left a father and mother and 12 brothers and sisters.

NEW MEXICO

Action:

Statutory authority is contained in the New Mexico Statutes of 1929, Sections 36-103 and 36-104.

Parties:

The action must be maintained by the personal representative of the decedent.

Statute of Limitations:

One year.

Maximum Damages:

There is no statutory limitation.

Awards Sustained, Reduced or Held Inadequate:

$12,000.00 for the death of a girl 13 years old who did most of the household work and looked after her younger sisters was held excessive and reduced to $7,500.00; $7,500.00 for the death of a 48-year-old man who earned $200.00 per month in support of his family, was held not excessive.

NEW YORK

Action:

Statutory authority for wrongful death action is found in the New York Consolidated Laws, Chapter 13, Sections 130 and 132 and Section 18, Article 1, of the New York Constitution.

Parties:

The action must be maintained by the personal representative.

Maximum Damages:

There is no limitation and a statutory limit is forbidden by the State Constitution.

Statute of Limitations:

Two years.

Damages:

The reasonable expenses of medical aid, nursing and attention incident to the injury causing death paid by the decedent or by a person entitled to distribution and the reasonable funeral expenses of the decedent are deemed proper elements of damage. When final judgment is rendered, the Clerk must add to the sum awarded, interest thereupon from the date of decedent's death.

In the following cases, awards have been held to be excessive:

(1) *Where Decedent is a Husband*: Verdict of $49,000.00 held excessive where decedent was 42 years old, left a widow and four minor daughters and was their sole support; verdict of $20,000.00 reduced to $10,000.00 where decedent was 28 years old earning $5.00 a day; verdict of $10,000.00 reduced to $6,000.00 where decedent was a carpenter and was 70 years old at time of death, leaving a widow and no children; verdict of $9,300.00 reduced to $7,800.00 where decedent was 63 years old, earning $1,500.00 a month and survived by a wife; verdict of $4,600.00 held excessive where plaintiff married decedent two days after the injuries which caused his death.

(2) *Where Decedent is a Wife*: Verdict of $7,500.00 held excessive for the death of a 63-year-old housewife with surviving husband and three adult sons; verdict of $7,500.00 reduced to $5,000.00 for death of 41-year-old housewife with no children.

(3) *Where Decedent is Minor Child*: In the death of a 12-year-old boy earning $3.00 a week, survived by his mother, verdict of $12,000.00 was reduced to $7,500.00; a 20-year-old daughter who assisted her mother and father at home and in a store, held a verdict of $9,500.00 was excessive; a verdict of $4,000.00 was held excessive for the death of a 16-year-old daughter survived by her father.

(4) *Adult Child*: Verdict of $10,000.00 in an action brought by the father of a 22-year-old son was excessive and reduced to $5,750.00 where there was no showing that the son had contributed to the father; a verdict was reduced to $2,500.00 where an adult child was not contributing to the support of his mother.

(5) *Where Decedent is a Father*: A verdict of $3,000.00 was held excessive where the decedent was 72 years old earning $300.00 a year and the next of kin were all adult children.

(6) *Where Decedent is a Mother*: A verdict of $6,086.00 for the death of a 64-year-old woman earning $20.00 a week and survived by an adult daughter, was reduced to $4,400.00.

Verdicts Held Not Excessive:

(1) *Where Decedent is Husband*: A verdict of $100,000.00 reduced by the trial court to $70,000.00 was upheld for the death of a Supreme Court Justice earning $17,500.00 a year who left a wife and two grandchildren; a verdict of $15,000.00 for the death of an engineer aged 25, earning $45.00 a week and leaving a widow and two children was upheld; where deceased was 21 years old supporting a wife and child, as a milk wagon operator, a verdict of $6,000.00 was upheld; $25,000.00 verdict was held not excessive where decedent left a widow, although that amount was in excess of the amount the widow would expect to receive in her life expectancy; $71,000.00 verdict upheld in favor of a 31-year-old widow for the death of her 31-year-old husband, earning $96.00

a week and leaving three dependent children; $25,000.00 upheld for death of a married man leaving 33-year-old widow and three minor children and earning $3,400.00 a year.

(2) *Where Decedent is Wife*: $10,000.00 held not excessive for death of wife survived by 49-year-old husband; $6,000.00 held not excessive for death of childless wife; $7,500.00 for death of married woman earning $26.00 per week held unreasonable.

(3) *Where Decedent is Mother*: Verdict of $800.00 for death of 70-year-old woman who supported her children held not excessive.

(4) *Where Decedent is Minor Child*: $5,000.00 upheld for death of 20-year-old girl survived by parents; $15,000.00 held not excessive for death of 8-year-old boy; $6,500.00 held not excessive for death of 8-year-old boy; $6,500.00 held not excessive for death of 4½-year-old girl. In this case, the trial court had cut the verdict to $3,000.00 and the appellate court reinstated it at $6,500.00; $7,500.00 held not excessive for death of 4½-year-old boy.

(5) *Where Decedent is Adult Child*: $13,000.00 for death of an unmarried female earning $3,000.00 a year and survived by her mother, who was dependent upon her for support and maintenance, held to be reasonable.

Verdicts Held to be Adequate:

(1) *Where Decedent is Husband:* The verdict awarding $6,500.00 for the death of a 33-year-old iron worker earning $45.00 a week, to his 32-year-old widow was held not to be inadequate; verdict of $5,000.00 was held to be adequate for death of a 28-year-old hospital inmate suffering from dementia praecox who left a widow and two children.

(2) *Where Decedent an Adult Child*: Where the deceased was 22 years old living with his father and mother and earning $9.00 a week, a verdict of $600.00 was held to be adequate; where decedent was a 28-year-old son, an inmate of the State Hospital, a $10,000.00 award was upheld.

(3) *Where Decedent is a Minor Child*: Verdict of $600.00 for the death of a child under six years of age was not set aside as inadequate.

(4) *Where Decedent is a Sister*: Verdict of $3,500.00 was held proper for the death of a decedent over age, survived by a sister and two brothers.

The following verdicts were held to be inadequate:

(1) *Where Decedent Was a Husband*: A verdict of $6,450.00 for the wrongful death of a man 34 years of age earning $50.00 a week and survived by a widow and 10-year-old son, was held to be inadequate and increased to $12,000.00; a verdict of $1,500.00 for the death of a 46-year-old man survived by a widow and two minor sons and earning $2,000.00 a year was increased to $5,000.00.

(2) *Where Decedent Was a Wife*: In an action by the husband, a verdict of $629.00 was held to be inadequate where said sum amounted to the doctors' and hospital bills, the court stating that the sum should have at least included the funeral expenses; where the deceased wife was 60 years of age and left surviving a husband, a verdict for $150.00 was held to be inadequate.

(3) *Where Decedent is a Minor Child*: A verdict of $1,000.00 for the death of an 8-year-old girl was held to be inadequate and was increased to $3,500.00.

NORTH CAROLINA

Action:

Statutory Authority is covered by the North Carolina Code, 1935, Section 160 and 161.

Parties:

Action must be maintained by the executor, administrator or collector of the decedent.

Maximum Damages:

There is no limitation.

Statute of Limitations:

One year.

Damages:

Damages are limited to the pecuniary injury resulting from the death.

Awards Sustained, Reduced or Held Inadequate:

(1) *Where Decedent is a Minor Child*: A recovery of $15,000.00 was sustained for the death of a 16-year-old minor.

NORTH DAKOTA

Action:

Wrongful death statute covered by Section 32-2101, North Dakota Revised Code.

Action does not abate by death of either party to the record.

Parties:

Action may be brought by the following, in the order named: (1) Surviving husband or wife, (2) Surviving children, (3) Surviving father or mother, (4) Personal representative. If persons entitled to sue refuse or neglect to sue within thirty days of demand of person next in order, then latter may sue. The action is brought for the benefit of the heirs of decedent.

Maximum Damages:

No statutory limitations.

Statute of Limitations:

Two years.

Damages:

Funeral expenses are allowable as element of damages.

Awards Sustained, Reduced or Held Inadequate:

(1) *Where Decedent is Husband*: Verdict of $3,000.00 held not excessive.

(2) *Where Decedent is Adult Child*: A recovery of $2,000.00 for death of 26 year-old man earning $4.00 a day contributed to parents, held not excessive; $3,000.00 damages sustained for death of 30-year-old daughter to 62-year-old father; $5,800.00 held not excessive for death of 22-year-old unmarried son who lived with his mother and supported her on a farm.

OHIO

Action:

Statutory authority is contained in the Ohio General Code, Sections 10509-10567.

Parties:

The action must be brought in the name of the personal representative for the exclusive benefit of the surviving spouse, children and next of kin.

Maximum Damages:

No statutory amount.

Statute of Limitations:

Two years.

Awards Sustained, Reduced or Held Inadequate:

(1) *Where Decedent is Husband*: $40,000.00 for the death of a 33-year-old locomotive engineer earning $2,200.00 per year and leaving a wife and minor daughter was upheld; $14,000.00 for the death of a 42-year-old plumber earning $1,500.00 per year and leaving a wife and minor children was sustained; $31,900.00 for the death of a laborer 24 years old, married and the father of two children, was held excessive, reduced to and affirmed for $24,000.00; $13,900.00 for the death of a 47-year-old man earning $20.00 per week, leaving a wife and children was reduced to $18,500.00; $30,000.00 for the death of a 24-year-old man with a responsible position, leaving a wife and two children was held reasonable; $30,000.00 for the death of a 41-year-old man which sum represented about one-half of his probable future earnings, was not excessive.

(2) *Where Decedent is Wife*: $19,000.00 for the death of a middle-aged married woman leaving a husband and grown children was affirmed after having been reduced to that amount from $28,000.00 by the trial court; $7,500.00 for the death of a married woman doing housework was held reasonable; $4,500.00 for the death of a 19-year-old housewife was held not excessive.

(3) *Where Decedent is Minor Child*: $6,000.00 for the death of an 18 months' old child was reduced to $4,500.00; $4,400.00 for the death of an 8-year-old child was held not to be excessive; $3,500.00 for the death of a 16-year-old boy leaving a mother and two young half-brothers was held not to be excessive.

(4) *Where the Decedent is an Adult Child*: $12,000.00 for death where a son was earning $325.00 per month and supporting an invalid father was confirmed; $1.00 for the death of an able-bodied young man was held inadequate; $2,500.00 for the death of a man with a life expectancy of 21 years and earning $2,000.00 a year was held inadequate.

(5) *Where Decedent is a Sister*: $5,000.00 for the death of a woman 58 years old contributing to the support of her sister was held adequate.

OREGON

Action:

Wrongful death statute is covered by the Oregon Code, 1930, Section 5-703.

Parties:

The action must be maintained by the personal representative of the decedent.

Maximum Damages:
Statutory limitation is $10,000.00.

Statute of Limitations:
Two years.

Damages:
Medical and hospital expenses incurred before death could not be recovered. Funeral expenses of the decedent can be recovered.

Awards Sustained, Reduced or Held Inadequate:
An award of $2,500.00 for the death of a mother of three children who earned $200.00 per month and was 38 years of age, was held not excessive. A judgment of $2,500.00 for the death of a minor son 8 years of age was held not excessive. A judgment for $5,000.00 for the death of a 7-year-old girl was held not excessive.

PENNSYLVANIA

Action:
Covered by Purdon's Pennsylvania Statutes, 1931 Edition, Title 12, Section 1601-04, and Title 20, Section 772.

Parties:
Under the Survival Act, the personal representative brings the action for the benefit of the Estate; under the Wrongful Death Act, the administrator brings the action for the surviving spouse, child or parents who are declared to share, as in the case of an intestacy.

Maximum Damages:
There is no maximum fixed by Statute.

Statute of Limitations:
One year.

Damages:
Under the Wrongful Death Act, the personal representative may recover the pecuniary loss sustained by the specified next of kin and in addition, the funeral and medical expenses, plus expenses of administration. The measure of damages under the Survival Statute would normally be the amount that the deceased could have sued for during his lifetime. However, to prevent double payment, it is required that the survival and death actions be consolidated for trial and where the pecuniary loss to the survivor duplicates damages awarded to the estate, the latter be reduced pro tanto. The Estate may also recover for pain and suffering of the deceased for medical expenses paid or incurred by the deceased but not for funeral expenses.

The following awards have been passed upon under the Survival and Death Statutes:

(1) *Where Decedent is a Husband*: $1,200.00 to the Estate, and $3,000.00 to the widow of a man 63 years of age, held adequate; $17,000.00 to the Estate and $18,825.00 to the widow of a law student, 27, earning $41.00 a week, held excessive; $2,505.00 to the widow of a man 59 earning $60.00 a month held not excessive; $1,000.00 for the death of a man 64 leaving a widow and two adult children, held adequate; $10,000.00 to widow and five children of man 50, earning $2,000.00 a year, held not excessive; $11,702.00 for the death of a man earning $30.00 a week, with an expectancy of 33 years, supporting his child, held not excessive; $23,500.00 for the death of a man 31 leaving his widow and three minor children, reduced to $17,000.00 plus expenses; $8,888.00 to wife and daughter 12, of man 46, contributing $88.00 a month to their support, held not excessive.

(2) *Where Decedent is a Wife*: $2,000.00 to a husband and nothing to the estate, held adequate for the death of a wife.

(3) *Where Decedent is a Minor*: $10,000.00 to the Estate, and $7,500.00 to the parents of a girl 6, reduced to $7,000.00 and $1,500.00; $3,750.00 to an estate and $377.00 to the parents of a boy 12 upheld; $1,710.00 to parents and nothing to the estate of a boy 5, held adequate; $5,317.00 for boy 6½ years old reduced to $3,500.00; $1,500.00 for boy 17, plus funeral expenses, held not excessive, though his keep cost more than his earnings; $1,500.00 for boy 9 held not excessive; $3,000.00 for 17 months' old infant reduced to the amount of funeral expenses; $3,300.00 for a boy four years old held excessive.

(4) *Where Decedent is Other Than as Above*:
$10,000.00 to a mother 58 of adult child reduced to $6,000.00; $15,000.00 to a son 3, of man earning $1,500.00 per year, held excessive; $12,300.00 to a daughter 18 and son 19 reduced to $6,000.00 for the death of their mother.

OKLAHOMA

Action:

Statutory authority is contained in the Oklahoma Statutes Annotated, Title 12, Section 1053.

Parties:

Action must be maintained by the personal representative of the decedent.

Maximum Damages:

There is no statutory limitation on the amount of recovery and the State Constitution forbids a statutory limitation being made.

Damages:

Medical and hospital expenses incurred before death and funeral expenses, are recoverable in the action.

There are a considerable number of decisions in Oklahoma under the wrongful death actions and the following are selected as representative:

(1) *Where Decedent is a Husband*: $15,000.00 for the death of a 44-year-old brakeman held not excessive; $30,000.00 awarded to a widow and child held excessive and reduced to $15,000.00; $15,000.00 for the death of a husband 38 years of age held not excessive; $15,000.00 for a 30-year-old employee who left a wife and small child, held not excessive; $30,000.00 awarded to the widow of a 35-year-old tool sharpener held excessive and reduced to $20,000.00; verdict of $35,000.00 reduced to $17,500.00; verdict of $34,250.00 reduced to $19,250.00; verdict of $30,000.00 reduced to $20,000.00. Other cases in this category reduced a $25,000.00 verdict to $15,000.00; a $20,000.00 verdict to $12,500.00 and upheld verdict of $30,000.00, $20,000.00 upheld, another one of $20,000.00 upheld, one of $15,000.00, one of $10,000.00 upheld, a $16,000.00 verdict upheld, reduced a $50,750.00 verdict for the death of a 38-year-old man, earning $200.00 a month, to $35,750.00.

(2) *Where Decedent is Minor Child*: $6,500.00 for the death of a 20-year-old minor not excessive; $6,000.00 for the death of a 17-year-old minor not excessive; reduced a verdict of $7,000.00 to $4,000.00 for a 20-year-old minor earning $40.00 a month; reduced an $11,000.00 verdict for the death of a 16-year-old boy, to $5,000.00; upheld an award of $8,000.00 for the death of a five-year-old son; upheld an award of $10,000.00 for a 14-year-old daughter; upheld an award of $6,000.00 for a four-year-old girl; sustained an award of $10,000.00 for the death of a 15-year-old boy who lived with his mother, a widow.

(3) *Where Decedent is a Father:* In an action by the minor child for the death of a father, an award of $20,000.00 was held excessive and reduced to $12,500.00; action by child aged 7 for the death of his father, 34 years of age, earning $140.00 a month, an award of $20,000.00 was held not excessive; $6,000.00 was held not excessive for the death of a man with a life expectancy of 36 years, leaving a 6-year-old daughter.

RHODE ISLAND

Action:

Statutory authority for wrongful death is contained in the General Laws of Rhode Island, 1938, Chapter 477, Section 1, and Chapter 512.

Parties:

Action may be maintained by the personal representative; if none, or if he fails to sue in six months, the beneficiaries in the following order: Surviving spouse and children; if none, next of kin.

Maximum Damages:

There is no limitation on the amount.

Statute of Limitations:

Two years. The cause of action survives the death of the wrongdoer.

Damages:

The rule has been set forth with exactness that the damage to the estate of the deceased caused by his death is computed by ascertaining the gross amount of prospective income, subtracting the probable amount of expenses, including personal living expenses, which the deceased would have laid out in acquiring such income, then reducing the net result to its present value.

Awards Sustained, Reduced or Held Inadequate:

(1) *Where Decedent is Husband*: A verdict of $7,583.00 for a farmer survived by widow and others, reduced to $6,000.00 due to errors in computation.

(2) *Where Decedent is Wife*: Verdict of $7,000.00 for husband and children of a married woman aged 54 upheld, although

the wife had no earnings at the time of death, but it was shown that she had earning capacity.

(3) *Where Decedent a Father*: Verdict of $900.00 for daughter of 47-year-old W. P. A. worker upheld.

(4) *Where Decedent is Minor*: Verdict of $2,500.00 upheld to parents of 16-year-old boy; verdict of $4,700.00 for death of five-year-old girl reversed on the ground that she had no earning capacity; verdict of $5,000.00 for 14-year-old boy working, held proper.

SOUTH CAROLINA

Action:

Statutory authority for wrongful death action is covered by South Carolina Code, 1932, V. I, Sections 412 and 413.

Parties:

Action for death must be brought in the name of the executor or administrator for the benefit of the wife or husband, or the child or children of deceased, and if there be none such, then for the benefit of the parent or parents, and if there is no parent, then for the benefit of the heirs-at-law.

Maximum Damages:

There is no limitation on the amount which may be recovered, except in actions against a county, or the State Highway Department.

Damages:

Funeral expenses are recoverable.

Awards Sustained, Reduced or Held Inadequate:

(1) *Where Decedent is Husband*: $24,000.00 for the death of a 50-year-old man was sustained in an action for the benefit of the widow and minor child.

(2) *Where the Decedent is a Father*: $13,000.00 sustained for the death of a 68-year-old itinerant merchant, survived by minor son and married daughter.

SOUTH DAKOTA

Action:

Wrongful death statute covered by Section 37.2201, South Dakota Code.

Parties:

Action must be brought in the name of the personal representative. It is maintained for the exclusive benefit of wife or husband and children, or, if there be neither of them, then parents and next of kin of deceased.

Maximum Damages:

Limited to $10,000.00.

Statute of Limitations:

Three years after death of deceased.

Damages:

Medical expenses may be recovered.

Awards Sustained, Reduced or Held Inadequate:

(1) *Where Decedent is a Minor Child*: $7,000.00 for the death of a five-year-old girl held not to be excessive; $5,000.00 for death of 19-year-old son contributing to the support of his mother, sustained; $7,750.00 for death of 18-year-old high school girl held not excessive; $1,780.00 for death of 13-year-old minor child sustained.

(2) *Where Decedent is an Adult Child*: Nominal damages only can be recovered by father for wrongful death of 28-year-old unmarried son, where it did not appear that he contributed to the support of the father.

TENNESSEE

Action:

Statutory authority for action for wrongful death is found in Michie's Tennessee Code of 1938, Sections 8236, 8240, 8242, 8691 and 8694. The death of the wrongdoer does not abate the action.

Parties:

Action may be maintained by the surviving spouse, if none, by the children, if none, by the next of kin, or by the personal representative of the deceased for the benefit of the wife, children or next of kin.

Maximum Damages:

No statutory limitation.

Statute of Limitations:

One year.

Awards Sustained, Reduced or Held Inadequate:

(1) *Where Decedent is Husband*: It was held that a $15,000.00 verdict was excessive where it was shown that that amount would bring more income than the deceased husband of the plaintiff had been able to earn. A remittitur was ordered to

reduce the amount to the present value of the deceased's probable earnings during his life expectancy at the time of the injury.

(2) *Where the Decedent is a Minor*: A $10,000.00 verdict was held not excessive for the death of a 15-year-old boy where it was shown that the boy was earning a living at the time of the death.

TEXAS

Action:

Statutory authority is found in Vernon's Civil Statutes of the State of Texas, Articles 4671 to 4677. The action is not abated by the death of the wrongdoer.

Parties:

The action may be brought by the surviving spouse, children, parents, or personal representative of the decedent.

Maximum Damages:

No statutory limitation.

Statute of Limitations:

Two years.

Awards Sustained, Reduced or Held Inadequate:

(1) *Where Decedent is Husband*: A verdict of $45,000.00 was reduced to $30,000.00 where it was determined that the jury had failed to discount the future earnings of the deceased; a verdict of $25,000.00 was held not excessive for the death of a truck driver earning $100.00 per month, survived by wife and children, and a dependent mother.

(2) *Where Decedent is a Minor Child*: A verdict of $12,500.00 for the death of a minor son was reduced to $7,500.00; a verdict of $4,000.00 was upheld for the death of a minor child; a verdict of $4,500.00 was sustained for a minor child; and a verdict of $7,500.00 was held not to be excessive for the death of a minor.

UTAH

Action:

Statutory authority is contained in the Utah Code Annotated, 1943, Title 104, Chapter 3.

Parties:

Action may be brought by the heirs or the personal representatives of the decedent.

Maximum Damages:

The amount of recovery may not be limited by statute by a constitutional provision.

Awards Sustained, Reduced or Held Inadequate:

A verdict of $5,000.00 for the death of a 7-year-old son was held excessive and reduced to $3,000.00; a verdict of $7,620.00 for the death of a 14-year old son was held not excessive; a verdict of $15,000.00 was held not excessive for the death of a 46 year old switchman earning $1,170.00 a year; a verdict of $10,000 for the death of a six-year-old boy was held not excessive; a verdict of $5,000.00 for the death of a father was held not excessive; a verdict of $1,000.00 was held to be inadequate where the deceased was 19 years old and assisted his father in performing his duties as an employee.

VERMONT

Action:

Statutory authority is contained in Public Laws of Vermont, 1933, Chapter 122, Sections 2855-6 and 2859-60.

Parties:

The survival action is brought by the personal representative for the benefit of the Estate. The wrongful death action is brought by the personal representative for the benefit of the surviving spouse and next of kin.

Maximum Damages:

There is no limitation as to amount.

Statute of Limitations:

Two years. Action for wrongful death abates on the death of the wrongdoer.

Damages:

Medical expenses are properly recoverable but burial expenses are not.

Awards Sustained, Reduced or Held Inadequate:

(1) *Where Decedent is an Adult Child*: A verdict of $15,000.00 for the death of a young woman was reduced to $9,000.00 by the trial court and upheld as not being excessive by the Appellate Court; a verdict of $3,500.00 for the death of a 21-year-old man survived by his mother was held not to be excessive.

(2) *Where Decedent is Minor Child*: A verdict of $200.00 awarded to parents for death of 17-year-old girl was held not to be inadequate where there was no showing of any pecuniary loss to the survivors.

VIRGINIA

Action:

Statutory action for wrongful death is covered by Virginia Code, 1936, Sections 5786 and 5787.

Parties:

Action must be maintained by the personal representative of deceased, for the benefit of the husband, wife, children or grandchildren, or if there be none, for the benefit of the parents, brothers and sisters.

Maximum Damages:

Statutory limitation of $10,000.00.

Awards Sustained, Reduced or Held Inadequate:

(1) *Where Decedent is Husband*: $10,000.00 for the death of a 69-year-old man earning $600.00 yearly, survived by a dependent wife and children, sustained.

(2) *Where Decedent is a Wife*: $10,000.00 for the death of a 31-year-old married woman, sustained.

(3) *Where Decedent is a Minor Child*: $10,000.00 for the death of a four-year-old minor child in an action brought for the benefit of the parents, sustained.

(4) *Where Decedent is an Adult Child*: $6,500.00 for the death of a 21-year-old unmarried son for the benefit of parents, sustained.

WASHINGTON

Action:

Statutory authority is covered by Rem. Revised Statutes Sections 183 and 159.

Parties:

The action must be brought by the personal representative of the decedent on the behalf of the heirs.

Maximum Damages:

There is no maximum limitation of damages.

Statute of Limitations:

Three years.

Damages:

Medical and hospital expenses incurred before death and funeral expenses of the decedent are recoverable in a wrongful death action.

Awards Sustained, Reduced or Held Inadequate:

(1) *Where Decedent is Husband*: An award of $1,500.00 for the death of a 27-year-old man earning $80.00 a month survived by a widow and child was held inadequate and increased to $11,500.00; a verdict for $10,000.00 was reduced to $6,000.00 where it appeared the deceased was 55 years old earning $50.00 a month; a verdict of $15,000.00 for the death of a 41-year-old man earning $150.00 was sustained; a verdict of $27,000.00 was reduced to $12,000.00 for the death of a man 39 years of age earning $75.00 a month; a verdict of $16,500.00 reduced to $14,000.00 by the trial court and was held not excessive for the death of a coal miner aged 35 years; a verdict of $18,000.00 for the death of a coal miner aged 35 years was held excessive; verdict of $17,500.00 was held excessive and reduced to $10,000.00 for the death of a man 33 years of age earning $2.75 a day; a verdict of $40,000.00 was excessive and reduced to $25,000.00 for the death of a locomotive engineer earning $150.00 per month survived by a widow and two children; a verdict of $20,000.00 was held excessive and reduced to $10,000.00 where plaintiff and her husband were in the photography business and plaintiff was able to continue the business after his death; a judgment of $13,500.00 was held excessive and reduced to $8,000.00 in an action by the widow and minor child of the deceased, aged 48 years, earning $3.50 per day, who had once abandoned his wife and family; verdict of $12,000.00 in favor of a childless wife for the death of a 39-year-old husband earning $300.00 a month was not excessive; $20,000.00 damages for the death of a husband with a life expectancy of 26 years earning $170.00 a month was not excessive; an award of $6,400.00 for the death of a husband 33 years of age earning $275.00 monthly who left a widow and 9-year-old daughter and three-year-old son was held insufficient and increased to $11,400.00.

(2) *Where Decedent is Wife*: An award of $500.00 was held inadequate for the death of a 62-year-old Indian woman who left a dependent husband; a verdict of

$4,000.00 was held not excessive for the death of a wife who had a life expectancy of 12 years; a verdict of $10,000.00 was held not excessive for the death of a wife aged 39 years; a verdict of $6,000.00 was held not excessive for the death of a wife, leaving a husband and two children.

(3) *Where Decedent is Minor Child*: An award of $1,200.00 to a father for the death of his 15-year-old son was inadequate and it was held that the father was entitled to $2,640.00; a verdict of $2,160.00 for the death of a one-year-old child was not excessive; a verdict of $2,500.00 for the death of a 6-year-old child was not excessive; a verdict of $1,000.00 for the death of a two-year-old daughter was not excessive; a verdict of $3,575.00 for the death of a minor child was not excessive; verdict of $3,833.00 for the death of a 9-year-old girl not excessive; an award of $6,000.00 to the mother of an 18-year-old son earning $50.00 a month was not excessive; a verdict of $5,000.00 was not excessive for the death of a 14-year-old girl; a verdict of $1,000.00 for the death of a 6½-year-old son was not excessive.

(4) *Where Decedent is Adult Child*: In an action brought by his mother for the death of a 26-year-old son, who was a railroad brakeman, a verdict of $6,000.00 was reduced to $2,000.00; an award of $8,500.00 in favor of a mother for the death of her son earning $175.00 a month was held not to be excessive.

WEST VIRGINIA

Action:

Statutory action for wrongful death is covered by West Virginia Code 1931, Section 55-7-6.

Parties:

Action must be maintained by the personal representative of the decedent for the benefit of the heirs-at-law.

Maximum Damages:

Statutory limits of $10,000.00.

Statute of Limitations:

Two years.

Awards Sustained, Reduced or Held Inadequate:

(1) *Where Decedent is Husband*: $8,000.00 for the death of a 36-year-old man survived by a widow and two children sustained.

(2) *Where Decedent is a Mother*: $5,000.00 sustained for the death of a woman 27 years old, survived by two children.

(3) *Where Decedent is a Minor Child:* $6,000.00 sustained for the death of a 19-year-old minor survived by parents, to whom he made small contributions.

(4) *Where Decedent is Adult Child*: $18,000.00 sustained for the death of an unmarried son, age not stated.

WISCONSIN

Action:

Recovery for death by wrongful act is covered by Section 331.03, Wisconsin Statutes. Cause of action survives the death of the wrongdoer whether this occurred before or after death of the injured person.

Parties:

Action must be brought by the personal representative in his name. It is for the exclusive benefit of the husband or widow or lineal descendants or lineal ancestors or brothers and sisters, in order stated. If there be no cause of action in favor of the estate, surviving spouses or parents, lineal descendants or ancestors, brothers and sisters, may sue directly.

Maximum Damages:

Limited by statute to $12,500.00 in addition to which $2,500.00 may be awarded to parent, husband or wife for loss of society or service.

Statute of Limitations:

Two years.

Damages:

Funeral expenses may be recovered as element of damages.

Awards Sustained, Reduced or Held Inadequate:

(1) *Where Decedent is Husband:* $4,500 for the death of a man 41 years of age earning $45.00 a week sustained; $9,000 sustained for death of 60 year old man earning $3,000 a year; $2,000 sustained for death of unskilled laborer 65 years of age; verdict of $2,500 for the death of a 45 year old working man earning $2.25 a day sustained; an award of $7,000 for the death of a 46 year old business man sustained; verdict of $9,000 for the death of a 48 year old husband with wife and minor child sustained; $2,000 held not excessive for

death of a consumptive with a short time to live, who contributed to the support of his family; $10,000 sustained for death of a 35 year old husband earning $155.00 a month, leaving four children; $8,700 sustained for death of 65 year old husband earning $200 a month; $7,143 sustained for death of 22 year old husband who was the only child of his parents with prospects of inheritance from them.

(2) *Where Decedent is Wife:* $2,500 held not excessive where decedent was 67 years old and surviving husband was 76 years old; an award of $3,500 sustained for the death of a wife of 38 years of age.

(3) *Where Decedent is Minor Child:* An award of $2,500 for the death of 11 year old child was held not excessive; an award of $3,700 for a five year old daughter sustained; an award of $2,500 for an eight year old boy sustained; an award of $2,000 for the death of a 16 year old daughter, who supported her mother, sustained; an award of $2,500 sustained for the death of each of three minor children to the mother and father, sustained.

(4) *Where Decedent is Adult Child:* An award of $2,500 for the death of a 21 year old boy sustained; an award of $4,800 was reduced to $3,500 for the death of an unmarried man 30 years of age earning $1.50 a day and contributing to the support of his widowed mother.

(5) *Where Decedent is Father:* Damages of $6,400 sustained for death of a father, a widower, sole support of two minor children and earning $100 per month, sustained.

WYOMING

Action:

Statutory authority is covered by Wyoming Revised Statutes, 1931, Section 89-404.

Parties:

The action must be brought by the personal representative of the decedent for the benefit of the heirs.

Maximum Damages:

No statutory limitation on the amount of recovery.

Statute of Limitations:

Two years.

No Wyoming cases have been reported concerning damages.

Report Of Committee On Fidelity And Surety Law

THE issuance of contractors' bonds on public government projects has been a necessary requirement since the enactment of the Heard Act in 1894, which is found in 40 U.S.C.A., Section 270 entitled, "An Act for the Protection of Persons Furnishing Material and Labor for the Construction of Public Works." This act had substituted for it what is popularly known as the Miller Act, which is found in 40 U.S.C.A., Section 270, also. The provisions of both acts are substantially similar and provide generally that a contractor working on public projects must furnish a surety bond to secure the payment of labor and materials furnished by subcontractors and materialmen. The purpose of the present article is to point out what the courts have considered as labor and materials, and what defenses, other than technical defenses, the surety companies may properly present to such claims.

One of the leading cases, *U. S. for the Use of Hill vs. American Surety Co.*, 200 U.S. 197, expresses the prevalent viewpoint as to the construction of the Acts when it said:

> "The purpose of the law 'as its title declares: is the protection of persons furnishing material and labor for the construction of public works;' • • • Such a contract should be interpreted liberally in favor of the subcontractor with a view of furthering the beneficent object of the statute."

In accordance with this liberal interpretation doctrine, the courts have held that a variety of things constitute "labor and materials furnished" which at first flush would seem not to be such as would make a surety company liable on its bond.

The Supreme Court in *Brogan vs. National Surety Co.*, 246 U.S. 257, reviewed many of these cases and then held that groceries and provisions furnished to and consumed by a contractor's employees were materials used in the prosecution of the

work and for the payment of which the surety was liable. It said in part:

> "This court has repeatedly refused to limit the application of the act to labor and materials directly incorporated with the public work."

In accordance with that statement, claims for which recoveries on the bond were allowed include (1) cartage and towage of material, as well as drawings and patterns used in making molds for castings which entered into the construction of a ship, *Title Guaranty and Trust Co. vs. Crane Co.*, 219 U.S. 24; (2) labor at a quarry fifty miles from the place where a breakwater had been contracted for. The labor included not only that of the men who mined the stone and removed the debris, but also that of the men who repaired the cars moving the stone to the breakwater, the track on which the cars moved, and the labor of the stablemen who drove the horses pulling the cars, *U. S. Fidelity Co. vs. Bartlett*, 231 U.S. 237; (3) Rental for cars, tracks and other equipment facilitating the work, the expenses of loading such equipment and the freight paid on it to get it to its place of use, *Illinois Surety Co. vs. John Davis Co.*, 244 U.S. 376; (4) The cost of workmen's compensation insurance, *United States vs. Seaboard Surety Co.*, 26 Fed. Supp. 681; (5) The rental of a tugboat which went aground due to low water during its use in the contract and remained there for several months after the contract was completed until finally floated off by high water, *Utah Construction Co. vs. U. S.*, 15 Fed. (2d) 21, C.C.A. 9th; (6) The cost of re-grading a section of ground where the original job had been completed under an erroneous opinion as to the plans for the location, *U. S. vs. Morley Construction Co.*, 98 Fed. (2d) 781, C.C.A. 2nd; (7) The cost of building a roof on a building which roof was purported in the original contract to be already built, *U. S. for the Use of Helie vs. Great American Indemnity Co.*, 30 Fed. Supp. 613; (8) Repair on equipment used in the contract and all necessary parts, equipment and appliances furnished to effectuate both the contract and the repairs, *Continental Casualty Co. vs. Clarence L. Boyd Co.*, 140 Fed. (2d) 115.

These cases, as can readily be seen, involve claims for extra work over and beyond the contract but which were necessary in order to complete the contract. There have been, however, exceptions to the general rule of liberal construction and granting of claims of all kinds. One of these cases arose in *L. P. Friestedt Co. and Farney Elec. Co. vs. U. S. Fireproofing Corp. and Fidelity and Deposit Co. of Maryland*, 125 Fed. (2d) 1010 C.C.A. 10th. Here, through the fault of the primary contractor, the subcontractor was considerably delayed in completing the work assigned to it, and it was claimed that this delay caused considerable additional expense. The court refused to allow this claim, saying:

> "We know of no case that has gone so far as to hold that one may recover damages for breach of a contract on a bond required under the Heard Act. The only case deciding this precise question has held to the contrary. *U. S. vs. Seaboard Surety Co.*, D.C. Mont. 26 Fed. Supp. 681. We fail to discern anything in the Heard Act evidencing a congressional intent to protect one under the bond required by the Act against damages resulting from breach of contract."

This case has been followed in the recent one, *U. S. for the Use of Edward E. Morgan Co. vs. Maryland Casualty Co.*, 54 Fed. Supp. 290, 1944, affirmed in 147 Fed. (2d) 423, 1945. Here the chief contractor had subcontracted for equipment and labor to build a dam outside Shreveport, Louisiana. The work progressed satisfactorily until only a short space separated the dam from the south bank. At that time the government engineer ordered the work stopped and refused to let the subcontractor move his equipment or use it for any purpose for a period of a month. The agreed rental value of the equipment under certain codes was in the neighborhood of $17,000. The court refused to allow recovery of this amount from the surety, saying:

> "The appellant has cited many cases which we have carefully considered. In every instance, however, where recovery was allowed on the bond, the outlay for which recovery was sought, was necessary for the performance of the contract, and was within the con-

templation of the parties to the contract."

It has also been held that a creditor of a contractor who furnished money to meet the contractor's payroll could not recover for the same from the surety as it did not constitute furnishing "labor or materials." *U. S. for the Use of Dorfman vs. Standard Surety and Casualty Company of N. Y.*, 37 Fed. Supp. 323. It would seem that this case clearly evidences the tendency of the courts to limit the scope of the allowable claims since furnishing money for the payroll is only one half step removed from furnishing groceries and lodging to the employees which claim was allowed in the *Brogan* case, supra, and it would seem that most people consider money for a payroll not only "materials" of the company but part of the staff of life.

A recent Supreme Court decision has limited those persons who can make claims under the Act. It was held that Section 2 of the Miller Act limited recovery to materialmen, laborers and subcontractors who deal directly with the primary contractors and those materialmen, laborers and subcontractors, who, lacking an express or implied contractual relationship with a primary contractor, nevertheless, have direct contractual relationships with a subcontractor and give the requisite statutory notice of their claims to the primary contractor. Hence, it was held that a person furnishing materials to a materialman was not entitled to maintain an action on the surety bond. *Clifford F. McEvoy Co. vs. U. S. for Calvin Tompkins Co.*, 322 U.S. 102, reversing 137 Fed. (2d) 565, which reversed 49 Fed. Supp. 81.

Another case wherein the surety was not held liable is *U. S. for the Use of New York Casualty Co. vs. Standard Surety and Cas. Co. of N. Y.*, 32 Fed. Supp. 836, wherein the suit was for unpaid insurance premiums on workmen's compensation and employers' liability insurance policies. (For an able article on this express subject, see the one presented by Garner W. Denmead in the April, 1941 Insurance Counsel Journal).

The general tests which may be made in any case confronting a surety company are:

1. Is the claimant within the class of persons protected under the Heard and Miller Acts?

2. If so, has he complied with the statutory requirements as to notice of his claim and other technicalities not considered in this article?

3. If both the former are answered affirmatively, then is the item sued on within the definition of "labor and materials furnished?" To determine this, the easiest method would be to look at the case of *Farnsworth and Co. vs. Electrical Supply*, 112 Fed. (2d) 150, (La.), where the decision was based on whether or not the items on which recovery was sought were necessary for the performance of the contract *and were actually consumed in the performance of the work*. It was held there that rental for equipment so used, necessary parts, appliances and equipment so used and to repair the equipment so used were valid items on which recovery could be had, whereas repair parts, appliances and accessories which added materially to the value of the equipment and rendered it available for other work were not recoverable items.

4. If the claim is for expenses incurred because of delay or negligence on the part of the primary contractor, it would seem that no recovery will be granted under the rule of the *Friestedt* and *Morgan* cases.

Generally speaking, the liability of the surety companies is a statutory one. The courts say that to fulfill the purpose of the Heard and Miller Acts, the ordinary technical defenses of the surety will not be admitted. However, since the liability is statutory, the courts have also held that the negligence of the insured, the primary contractor, is not alone sufficient to raise the surety's liability where the claimant alleges damages because of delay, lack of profit because of cancellation, or loss due to items furnished which items are not within the statutory meaning of "labor and materials."

Report of Committee on Health and Accident Insurance

THE Health and Accident Insurance Committee believes that the most significant developments of recent years in the field of health and accident insurance are those relating to proposed State and Federal Compulsory Health and Accident Insurance Programs. Statistics published in the Journal of the American Medical Association (July, 1945) show that no less than 102 compulsory health or accident insurance bills were introduced in state legislatures in this country in the period from 1935 to April, 1945, and certainly that total has been greatly increased during the subsequent period. During recent years numerous such measures have been introduced in the Congress of the United States, many of which have taken the form of proposed amendments to the present Social Security Act while others have proposed even more comprehensive programs.

Your committee has made no effort to study or analyze the various state legislative programs but has studied and attempted to prepare a brief analysis of the most important of the pending Federal measures having to do with this subject. Most recent of these bills is Senate Bill No. 1606, introduced November 19, 1945, by Senators Wagner and Murray entitled "The National Health Act of 1945" (its house counterpart being H. R. 4730 introduced by Representative Dingell on the same date). Introduction of this bill followed immediately the submission to the Congress by President Truman of a special message on national health to which reference is hereafter made.

The bill contains two titles. Title I covers grants to the several states for public health service, maternal and child health services, services for crippled children, and medical care of needy persons. This part of the act adds certain new provisions and amends, and in many respects greatly enlarges various provisions of the Public Health Service Act of 1944, and the Social Security Act.

It is with Title II, however, that we are here primarily concerned. This part of the act entitled "Prepaid Personal Health Service Benefits" proposes by amending and enlarging upon the provisions of the Social Security Act to make health insurance (called personal health service benefits) available to every currently insured employee, to every specified dependent thereof, to every individual (retired or survivor) entitled for any period to monthly benefits under Title II of the Social Security Act, and to certain needy and other non-insured individuals.

Administration of the act is committed by its terms to the Surgeon General of the Public Health Service "under the supervision and direction of the Federal Security Administrator" after "consultation" with a "National Advisory Medical Policy Council" created by the act. This Council is to consist of the Surgeon General and sixteen members to be appointed "without regard to the Civil Service laws" by the Surgeon General and with the approval of the Federal Security Administrator.

The bill authorizes and directs the Surgeon General to take all necessary and practical steps to arrange for the availability of various "personal health service benefits" which are defined to include general medical benefits, special medical benefits, general dental benefits, special dental benefits, home-nursing benefits, laboratory benefits, and hospitalization benefits.

The scope of the benefits to be provided can best be judged by the following definitions taken from the bill:

"(b) The term 'general medical benefit' means services furnished by a legally qualified physician or by a group of such physicians, including all necessary services such as can be furnished by a physician engaged in the general or family practice of medicine, at the office, home, hospital, or elsewhere, including preventive, diagnostic and therapeutic treatment and care, and periodic physical examination.

"(c) The term 'special medical benefit' means necessary services, requiring special skill or experience, furnished at the office, home, hospital, or elsewhere by a legally qualified physician who is a specialist or consultant with respect to the class of service furnished, by a

group of such physicians, or by a group of physicians including such specialists or consultants.

"(d) The term 'general dental benefit' means services furnished by a legally qualified dentist or by a group of such dentists, including all necessary dental services such as can be furnished by a dentist engaged in the general practice of dentistry (with or without the aid of an assistant or hygienist under his direction) and including preventive, diagnostic and therapeutic treatment, care and advice, and periodic examination.

"(e) The term 'special dental benefit' means necessary services, requiring special skill or experience, furnished at the office, hospital, or elsewhere by a legally qualified dentist (with or without the aid of an assistant, a hygienist, or anesthetist under his direction) who is a specialist or consultant with respect to the class of service furnished, by a group of such dentists, or by a group of dentists, including such specialists or consultants.

"(f) The term 'home-nursing benefit' means nursing care of the sick furnished in the home by (1) a registered professional nurse; or (2) a practical nurse who is legally qualified by a State or, in the absence of State standards or requirements, who is qualified with respect to standards established by the Surgeon General after consultation with the Advisory Council and with competent professional nursing agencies, and who furnishes nursing care under the direction or supervision of the State health agency, the health agency of a political subdivision of a State, or an organization supplying and supervising the services of registered professional nurses.

"(g) The term 'laboratory benefit' means such necessary laboratory or related services, supplies, or commodities as the Surgeon General may determine, including chemical, bacteriological, pathological, diagnostic and therapeutic X-ray, and related laboratory services, refractions, and other ophthalmic services furnished by a legally qualified practitioner other than a physician, physiotherapy, special appliances prescribed by a physician and eyeglasses prescribed by a physician or other legally qualified practitioner: *Provided,* That when any such services, supplies, or commodities are provided to a hospitalized patient, or are provided by a physician or dentist incidental to services furnished under subsections (b), (c), (d), and (e) of this section, payment for such services, supplies, or commodities shall be included in payments for hospitalization or for services furnished under such subsections, respectively, as otherwise provided in this title.

"(h) The term 'hospitalization benefit' means an amount, as determined by the Surgeon General after consultation with the Advisory Council; Not less than $3 and not more than $7 for each day of hospitalization, not in excess of thirty days, which an individual has had in a period of hospitalization; and not less than $1.50 and not more than $4.50 for each day of hospitalization in excess of thirty in a period of hospitalization; and not less than $1.50 and not more than $3.50 for each day of care in an institution for the care of the chronic sick. . . ."

Except as to the number of days in any year for which any individual may be entitled to hospitalization benefits (60 days, with power in the Surgeon General to increase to 120 days if he finds funds available) the extent and cost of benefits furnished are not expressly limited. The Surgeon General is, however, within certain limits authorized to impose limitations in benefits in any calendar year, or part thereof, such limitations to be imposed only "after good and sufficient evidence indicates that such determination is necessary and desirable to prevent or reduce abuses of entitlement to any such benefits."

The bill does not concern itself with methods of financing the enormous expenditures involved in furnishing the benefits proposed. It merely creates on the books of the Treasury of the United States a separate account to be known as the "Personal Health Service Account," and provides that "there is hereby authorized to be appropriated to the account such sums as may be required to finance the benefits, payments, and reimbursement provided under this title." Senator Wagner's statement on this point, as it appears in the Congressional Record, is in part as follows:

"A nation-wide comprehensive prepayment medical-care plan can be financed in any one of several different ways. Premiums can, for such a purpose, be raised through income or general taxes or through pay roll contributions, or both. In either case minimum and maximum provision can be provided. The extent of a general governmental contribution out of general revenues to such a plan depends upon the comprehensiveness of the groups covered and the services provided."

An interesting sidelight on the failure to provide for financing the proposed benefits is furnished by noting that the Senate bill, without the inclusion of revenue raising taxation provisions, could be and was referred to the Senate Committee on Education and Labor, of which Senator Murray is Chairman, instead of to the Committee on Finance to which the bill would have been referred had it contained taxing provisions. Similarly, the House bill was referred to the friendly Committee on Interstate and Foreign Commerce instead of to the Committee on Ways and Means which would have jurisdiction of legislation to impose taxes.

The bill grants very broad powers to the Surgeon General. Some of these have been indicated above. Among others may be mentioned the following:

(a) Power to make and publish, with the approval of the Federal Security Administrator, such rules and regulations as may be necessary to "efficient administration."

(b) Power to negotiate agreements with public and private agencies, persons or groups to utilize their services and facilities and to pay for them.

(c) Power to contract for all supplies and commodities necessary for the furnishing of the contemplated benefits.

(d) Power to designate what medical or dental services are to be regarded as "specialist or consultant services" and to designate practitioners qualified as specialists or consultants.

(e) Authorization to publish and make known in each local area the names of medical and dental practitioners who shall have agreed to furnish services as benefits under the act, and to make such lists of names readily available to individuals entitled to benefits.

(f) Power to prescribe maximum limits to the number of potential beneficiaries for whom a practitioner or group of practitioners may undertake to furnish general medical or dental benefits, and to make such limits nationally uniform or not as the Surgeon General may determine.

(g) Power to find what hospitals are entitled to be classed as participating hospitals and direction to publish lists of such institutions.

(h) Power to establish appeal bodies to hear complaints from individuals entitled to benefits, from practitioners who have entered into agreements to furnish benefit services, and from participating hospitals, and to hear and determine disputes among practitioners and/or participating hospitals.

Among the miscellaneous provisions of the bill are provisions that no individual shall be entitled to any benefit with respect to any injury, disease or disability on account of which any medical, dental, home-nursing, laboratory or hospitalization service is being received, or upon application therefor would be received under a Workmen's Compensation plan of the United States or of any State. In case of any individual receiving personal health service with respect to any such injury, disease or disability, the Surgeon General is subrogated to the rights of such individual against any person, organization or agency to the extent of the cost of furnishing such services.

Although the bill, by reason of its length (78 pages) and involved and confusing phraseology, defies a logical or simple analysis, it is hoped that the foregoing will convey at least some general idea of a type of proposed legislation that is and should be a matter of concern, not only to the medical and legal profession but to the general public.

Bills having the same general objectives have been introduced in every session of Congress in recent years. Some have been, and those of the future undoubtedly will be, of even broader scope. That such legislation would put the Government into the health and accident insurance business

on a vast scale is only too obvious. That the adoption of Senate Bill No. 1606, or any similar bill, would be only the forerunner of even more drastic legislation along these lines seems equally obvious. In fact, the latest Wagner-Murray-Dingell bill falls far short of the recommendations of President Truman in his message to Congress of November 19, 1945, in which, among many others, the following recommendations were made:

"I recommend solving the basic problem by distributing the costs through expansion of our existing compulsory social insurance system. This is not socialized medicine. Every one who carries fire insurance knows how the law of averages is made to work so as to spread the risk and to benefit the insured who actually suffers the loss. If, instead of the costs of sickness being paid only by those who get sick, all the people—sick and well—were required to pay premiums into an insurance fund, the pool of funds thus created would enable all who do fall sick to be adequately served without overburdening any one. That is the principle on which all forms of insurance are based.

* * *

"The ability of our people to pay for adequate medical care will be increased if, while they are well, they pay regularly into a common health fund instead of paying sporadically and unevenly when they are sick. This health fund should be built up nationally in order to establish the broadest and most stable basis for spreading the costs of illness and to assure adequate financial support for doctors and hospitals everywhere. If we were to rely on state by state action only, many years would elapse before we had any general coverage.

* * *

"None of this is really new. The American people are the most insurance minded people in the world. They will not be frightened off from health insurance because some people have misnamed it 'socialized medicine.'

* * *

"I am in favor of the broadest possible coverage for this insurance system. I believe that all persons who work for a living and their dependents should be covered under such an insurance plan. This would include wage and salary earners, those in business for themselves, professional persons, farmers, agricultural labor, domestic employees, government employees and employees of nonprofit institutions and their families. In addition, needy persons and other groups should be covered through appropriate premiums paid for them by public agencies. Increased federal funds should also be made available by the Congress under the public assistance programs to reimburse the states for part of such premiums, as well as for direct expenditures made by the states in paying for medical services provided by doctors, hospitals and other agencies to needy persons.

* * *

"What I have discussed heretofore has been a program for improving and spreading the health services and facilities of the nation and providing an efficient and less burdensome system of paying for them. But no matter what we do, sickness will of course come to many. Sickness brings with it loss of wages. Therefore, as a fifth element of a comprehensive health program, the workers of the nation and their families should be protected against loss of earnings because of illness. A comprehensive health program must include the payment of benefits to replace at least part of the earnings that are lost during the period of sickness and long term disability. This protection can be readily and conveniently provided through expansion of our present social insurance system, with appropriate adjustment of premiums.

"Insurance against loss of wages from sickness and disability deals with cash benefits rather than with services. It has to be coordinated with the other cash benefits under existing social insurance systems. Such coordination should be effected when other social security measures are re-examined. I shall bring this subject again to the attention of the Congress in a separate message on social security."

"I strongly urge that the Congress give careful consideration to this program of health legislation now."

The American Medical Association has vigorously condemned such proposed legislation from the viewpoint of the evils of "socialized" or "state" medicine. The American Bar Association has condemned a similar bill as legislation "which either inadvertently or with deliberate subtlety constitutes a direct attack on the rights and liberties of the citizens of this country" in that it further weakens local self government, seeks to invest non-elected officials with arbitrary rule-making power having the force of law, furnishes the instrumentality by which the medical profession is made subservient to a Federal agency, fails to safeguard the rights of patients, citizens, hospitals, or doctors from the arbitrary or capricious action of one man, and furthers the vicious system of administrative law. (See report dated February 25, 1944, of the Committee appointed by the House of Delegates August 26, 1943, to analyze Senate Bill No. 1161).

Many others condemn it as further Government encroachment, both actual and potential, upon fields that in the main can better and more efficiently be served by private industry. Such critics point out that while it may well be that some aspects of the problems involving the extension of health services and the protection of income are proper subjects of Government concern and action, this does not signify that the Government should take over the furnishing of health and accident insurance to all its citizens. They question whether there is not grave danger in any politically administered insurance system of gross abuses in administration such as the dissipation of funds on groundless or doubtful claims as a result of political pressure, lack of proper investigation, encouragement of malingering, and the ever present temptation to some physicians to keep themselves on the public pay-roll by keeping their patients there. They further point out that while private insurers could not engage to supply nation-wide protection on a single group basis, the insurance industry has demonstrated, through the tremendous expansion in recent years of private group insurance, that it is capable of doing an increasingly comprehensive job of filling the need for this type of insurance and that it is doing it on the basis of sound actuarial and financial policies.

Proponents of this type of legislation rest their case largely on the premise that widespread social and economic reforms are urgently needed, and that only Government can bring about these reforms. This viewpoint is well summarized in President Truman's message to Congress of November 24, 1945, to which reference has been made above.

It is not within the jurisdiction or purposes of this Committee to argue the merits or demerits of socialized medicine, socialized industry, or other social questions. Nor do the functions of this Committee include the making of recommendations for or against pending legislation. We therefore offer this altogether inadequate report without recommendation other than to urge the vital importance of giving individual and collective thought and study not only to currently pending legislation but to the whole subject of compulsory national insurance.

Respectfully submitted,
Lester P. Dodd, *Chairman*
Arthur L. Aiken
John D. Andrews
Paul P. Chaney
Alvin R. Christovich
Wayne Ely
John H. Hughes
Lionel P. Kristeller
Oliver H. Miller
Kenneth P. Grubb, *Ex-Officio*

Report of General Legislative Committee

THERE has not been much activity on the part of the General Legislative Committee of the International Association of Insurance Counsel this year. Very few legislatures have been in session and the committee has been called upon only a few times in connection with any legislative matters.

In accordance with the policy adopted by the Executive Committee we have held

ourselves in position to make available help of the members of the association when it has been properly sought.

We have been in touch with the various organizations composed of insurance interests generally including: Association of Casualty and Surety Executives; American Mutual Alliance; The Association of Life Insurance Presidents; American Life Convention and National Board of Fire Underwriters.

The Committee has continued the policy of refraining from taking the initiative in legislative matters but to interest itself only in such questions as the insurance business through their properly instituted representatives request our help.

As was stated in our report of a year ago the insurance business has expressed and shown appreciation of the willingness and desire of the members of our association to be of assistance in legislative matters. Statements have been made to the Committee that it is reassuring to the business to know that throughout the country the members of the Association are standing ready to respond to the call for help whenever such assistance seems proper and advisable.

Respectfully submitted,

Clarence F. Merrell,
Chairman.

Report of the Committee on the Unauthorized Practice of Law

ACTIVE functioning of this Committee depends upon instances of the practice of law without authority either being discovered by it or being brought to its attention.

Such survey as the Committee has been able to make has elicited no such instances and none have been reported to it during the current year. It is therefore possible to make only a negative or standby report and it is the Committee's hope that the quiescent situation reflects the conditions in the field which is the scope of its jurisdiction.

Respectfully submitted,

C. M. Horn, Chairman
Lewis C. Ryan
Albert C. Schlipf
Philip J. Schneider
Stuart Paul Weiss
Hugh D. Combs, Ex-Officio

Report of Committee on Life Insurance

THIS Committee herewith tenders its report to the membership in the hope that the subjects discussed herein will be of interest and assistance to those of the Association having for study and decision the problems arising from

(1) Abandonment of policy by inaction of the insured.

(2) Unreasonable delay in presenting claim and proof of disability.

I
ABANDONMENT OF POLICY BY INACTION OF THE INSURED

Before moving into a discussion of what the Courts have held in cases involving the issue of abandonment, suppose you had for defense a suit wherein the facts are as follows:

Mr. A., living in a certain state, applied for two policies of life insurance, nonparticipating, each in the amount of $5,000. Premiums were payable semi-annually. He was married and had two children. The wife was the beneficiary in each policy. The policies were duly issued and the premiums were promptly paid for about seven years. Trouble then arose and there developed a rift in the marital relations. The insured brought suit for divorce. The wife (beneficiary) in due time filed a cross-petition.

While this suit was pending and before trial or decree, a semi-annual premium fell due. Notice, correspondence, and the usual 31 day letter ensued. The insured requested a loan on the policy to pay this premium. The loan was granted and the policy

duly endorsed to the effect that it was pledged as security for loan indebtedness and then it was returned to the insured.

Before the next semi-annual premium came due, trial was had and decree granted the wife in the divorce action. The decree attempted to fix the rights of the beneficiary in these policies and carried a prohibition against the insured borrowing on same, except for the purpose of paying premiums, and then only "with the wife's prior consent." A copy of the decree was sent to the Company by the wife's attorneys, who requested the Company to agree to follow the terms of the decree as to the prohibition against loans. However, the Company sent a letter to the attorneys enclosing forms for Automatic Premium Loan Request. The Company further explaining that, rather than try to follow the terms of the decree with reference to premium payments, that both the insured and beneficiary should sign the Premium Loan Request which would then insure that the premiums would be paid out of the cash values of the policies in case the insured failed to make payments when due. Forms were also enclosed whereby the beneficiary was made a joint life owner, and thereby be entitled to receive premium notices.

Some delay was occasioned in getting the Requests signed and returned to the Company and during this time the next semi-annual premium came due. The insured was notified. He did not pay within the grace period, but five days after the grace period had expired he requested reinstatement and also requested a loan to pay this semi-annual premium. The reinstatement was permitted, the loan made. Four days later the "Automatic Premium Loan Request" signed by both the insured and the beneficiary was received by the Company from the wife's attorneys, and duly noted on the policy.

Thereafter no further premiums were paid by either the insured or the beneficiary. All premiums were paid by route of the Premium Loan Requests. On a certain date nearly five years later, the indebtedness on the one policy which became the subject of the suit was within 8c of the cash value if all premiums had been paid when due.

The insured was notified, but no notice was sent to the joint life owner. The insured did not respond. A 31 day letter was sent the insured advising of the indebtedness and requesting prompt payment of the then past due semi-annual premium. The letter stated also that if the premium was not received on or before a certain day (May 17, 1941), the policy would cease to be in effect. Silence prevailed. No answer came.

In March, 1942, the wife's attorneys inquired of the Company the status of the policies. They were promptly advised that the one policy lapsed for non-payment of premium as of May 17, 1941, and that the other policy had sufficient cash value remaining to carry it to a certain date. (This policy, less indebtedness, was later paid to the beneficiary). The attorneys were further advised that if the beneficiary would pay the semi-annual premium which was past due in April, 1941, and one annual premium which was past due in October, 1941, the policy would be reinstated and would remain in force until October 15, 1942. These attorneys then wrote the Company that their client, the named beneficiary, recognized that the policy had ceased to be in effect as of May 17, 1941. That she would forward the amount requested. Silence again prevailed. On July 3, 1942, another attorney in another state, to which the beneficiary had removed, inquired by letter how much money it would take to reinstate this policy; also that his client knew that the policy had lapsed, but that she would raise the necessary amount and forward it. The Company wrote this attorney and again stated the necessary amount to reinstate, which was the same amount as previously stated in the Company's letter to the other attorneys in March of 1942. It also offered the assistance of its agent who wrote the policy to help the beneficiary to place the policy in force. The Company was then advised by this attorney that the amount requested would be sent at once. Again silence prevailed. On August 3, 1942, the Company, not having received the sum specified, wrote the beneficiary to the effect that in view of the failure to send her, as joint life owner, a 31 day letter in May, 1941, that it would now give her an extension of 31 days from August 3, 1942, to pay the necessary amount, to-wit, one semi-annual and one annual premium. Nothing more was heard from either the beneficiary or her attorneys. No premiums were sent to the

Company. On January 23rd, 1943, the insured died.

The policy not involved in suit, less indebtedness, was paid promptly on receipt of proofs of death. The company refused the claim on the policy which had lapsed in May, 1941.

Suit was commenced to recover the sum of $5,000.

The beneficiary and joint life owner based her suit on (1) failure of the Company to send premium notices to her as joint life owner. (2) Had she been so advised, she could have compelled the insured to pay the premiums. (3) The Company had no right in view of the provisions in the decree of divorce to loan the insured the amount necessary to pay the October, 1936, premium (which premium was necessary to reinstate). (4) Had the loan not been made and the accumulated interest thereon for 5 years not been charged against the cash value, the policy would have had cash value sufficient to carry it beyond the date of death of the insured.

The policy carried the usual provision for the payment of premiums, to-wit:

> "All premiums shall be paid in advance at the Home Office of the Company, or to its authorized agent, * * * If any premium is not paid when due this policy shall cease, subject to the values and privileges herein described; except that a grace period of 31 days, during which the policy shall remain in force and effect."

THE ISSUES

1. Was there an abandonment of the policy by the insured?

2. Was there an abandonment of the negotiations by the beneficiary to reinstate the policy?

3. Assuming that the Company should have mailed premium notices to the joint life owner and sent her a 31 day letter in May, 1941, what was the effect of such failure in view of, (a) direct negotiations by the joint life owner with the Company in 1942 for reinstatement; (b) her knowledge and recognition that the policy had ceased to be in effect after May, 1941; (c) her request to the Company to advise of the amount necessary to reinstate; (d) the Company's 31 day letter of August 3, 1942, allowing 31 days additional time to pay the necessary amount to reinstate; (e) her silence and inaction thereafter; (f) her opportunity from March of 1942 to September 4, 1942, to reinstate without medical examination of the insured?

4. Had she sustained any damage by any action of the Company?

5. Was she entitled to recover under these facts?

6. Was it not within the Company's rights to correct its omission to send premium notices and the 31 day letter to her?

The above factual situation is presented so that the reader will have a concrete example before him, of the problems encountered in a suit involving the defense of abandonment by inaction, and abandonment of negotiations to reinstate.

From the foregoing situation it will be seen that, (1) the insured failed to perform the obligations imposed on him by the contract; (2) That he by his silence and inaction abandoned the policy; (3) That the beneficiary early in 1942 had knowledge that the policy had lapsed in May of the previous year; (4) That the Company failed to send her as joint life owner the premium notices; (5) That irrespective of this omission, the Company did all in its power compatible with keeping the policy in force and preventing a lapse; (6) That the beneficiary recognized that some action on her part was necessary to put the policy in force or reinstate it, when she sought information from the Company as to what amount of money (premiums) would be necessary to reinstate; (7) That she abandoned the opportunity to reinstate and abandoned all negotiations while the insured was still alive.

Is there not a striking similarity here to the words of Mr. Justice Brewer in the opinion in *Mutual Life Insurance Company v. Hill,* 193 U. S. 551, 48 L. Ed. 788, where it was said:

> "Under those circumstances the insured failed to pay, and continued such failure for four years prior to his death. Yet, notwithstanding his failure to perform his part of the contract —and performance by the insured underlies the obligation of the insurance company to perform its part—this action is brought to compel the per-

formance by the company that would have been due had he performed."

Justice Brewer, in a few choice words, then went on to say in concluding the opinion:

> "Courts have always set their faces against an insurance company which, having received its premiums, has sought by technical defenses to avoid payment, and in like manner should set their faces against an effort to exact payment from an insurance company when the premiums have deliberately been left unpaid."

The defenses interposed in the Hill case, supra, were (1) non-payment of premiums, and (2) abandonment of the policy.

In the Swayze case, (*Swayze v. Mutual Life Insurance Co.*, 32 Fed. 2d 784), two policies of insurance had been issued to plaintiff's husband on November 10, 1919. The first premium was paid on delivery of the policies. No other premiums were paid or tendered. The insured died about three years after the delivery of the policies to him. The beneficiary, as a basis for her suit to collect the face of the policies, claimed irregularity in the giving of premium notices and in the notices of forfeiture sent by the company.

The Court, in denying recovery to the beneficiary, said:

> "From the facts stated there is no particle of doubt of the fact of abandonment. * * * There is neither right nor justice in the claim of the plaintiff. The language in the (Hill case, 193 U. S. 551, 48 L. Ed. 788) controls the disposition of this case."

In *Walsh v. Aetna Life Insurance Co.*, 43 A. 2d 102 (Pa.), the policy was issued October 17, 1924. The policy lapsed for non-payment of premium due June, 1934. Suit was brought by the beneficiary. The defense interposed was that because of failure to pay premiums, the policy lapsed July 19, 1934. There were loans against the policy made by the insured which exceeded the cash value by about fifteen dollars. The company proved that it had requested of the insured a tender of the premium due, but had not received any. The insured died May 7, 1941.

The Court said in denying recovery to the plaintiff:

> "He knew that to keep a policy alive premiums must be paid when they are due, or within 31 days thereafter. * * * The company by its letter of June 18th really invited the insured to pay the premiums so that the policy could remain in force, and offered the assistance of its local agent in keeping the policy in force. * * * He did not even enter into negotiations though the letter of June 18th really invited him to do so. He really took an attitude of 'let it go'."

In *Kiley v. Pacific Mutual Life Ins. Co.*, 186 So. 559, (Ala.), Kiley applied for and received from the company a life insurance policy. He was employed by the L. & N. Railroad Company. He gave an order on his employer to pay the premiums. On November 12, 1936, he wrote his employer to cancel the enclosed policy, stating that "he was unable financially to carry it." He committed suicide six days later. Suit was brought against the insurance company to recover on the policy. The company defended on a plea of abandonment.

The Court sustained the plea and stated in its opnion:

> "The abandonment by assured of his policy, set up by pleas as indicated, was effective without affirmative action on the part of the insurer."

In *McGeehan v. National Life Insurance Co.*, 111 S.W. 604 (Mo.), the policy provided for semi-annual premiums. The insured paid for twelve years, then paid no premiums for eight years. The policy was subject to a state statute which required notice to insured of proposed forfeiture for non-payment of premiums. The Court, in finding against the beneficiary, held that the insured had abandoned his contract regardless of the non-action of the insurance company in not notifying him of a forfeiture of his policy.

INTENT

45 C. J. S., p. 68, Sec. 443, states:

"Insured may abandon a policy of insurance, and abandonment by insured may be effective without affir-

mative action by the insurance company. The test of abandonment is the existence or non-existence of an intent to abandon."

ABANDONMENT IS AN AFFIRMATIVE DEFENSE AND MUST BE PLEADED

In *Meyer v. Jefferson Standard Life Insurance Co.*, 271 S.W. 217 (Texas), the Court said:

> "Moreover neither waiver nor abandonment was pleaded by appellee, (Insurance Company)."

In *Johnson v. Hartford Insurance Co.*, 197 S.W. 132, (Mo.), it was held:

> "The abandonment of an insurance contract is an affirmative defense, which is waived if not pleaded."

ABANDONMENT OF NEGOTIATIONS TO REINSTATE

In *Clow v. Western Life Indemnity Co.*, 182 Ill. App. 251, the Court held:

> "A member wrongfully suspended, who, after a compromise agreement of a dispute has been reached, abandoned the negotiations, held, to have abandoned his policy and acquiesced in its cancellation."

In *Mutual Life Co. v. Sears*, 178 U.S. 344, 44 L. Ed. 1096, Mr. Justice Brewer, speaking for the Court, in the opinion said:

> "It is needless to do more than note the fact, that, as shown by the answer, after the insured had once defaulted in May, 1893, a second default occurred * * * application was made to him by the company through its agents, to restore the policy, and that he declined to make any further payments or to continue the policy, and elected to have it terminated, which election was accepted by the company, and the parties to the contract treated it thereafter as abandoned."

In *Mutual Life Insurance Co. v. Phinney*, 178 U.S. 1088, the policy provided that it would become void if the premiums were not paid when due. The second annual premium was not paid. Notice was sent to the insured. He tendered a note which was declined. Later the insured met the agent and told him he was prepared to pay the premium. The agent told him he would now have to furnish a health certificate. This was never furnished, because the insured said "he could not obtain it." He died the next year.

The Court held:

> "An abandonment and rescission of a contract of life insurance by mutual agreement of the parties after the insured is in default by non-payment of premiums will put an end to the contract, although a forfeiture could not have been declared, by reason of the failure of the insurer to give notices required by statute."

The following cases are a few only of those cases wherein the courts have held that the policy had been abandoned:

Clow et al v. Western Life Indemnity Co., 182 Ill. App. Rep. 251 (1913).

McGeehan v. Mutual, 111 S.W. 604 (1908 Kansas City C. of A.)

Dreher v. Guaranty Ins. Co., 199 So. 135, 196 La. 326 (Sup. Ct. La. 1940).

Swayze v. Mutual, 32 F. (2) 789 (Dist. Ct., D. Kans. 1929).

Mutual v. Hill, 193 U.S. 551, 24 S. Ct. 538, 40 L. Ed. 788 (1904).

Missouri State v. Ross, 48 S.W. (2) 230 (Sup. Ark. 1932).

Kiley v. Pacific Mutual, 186 So. 559 (Sup. Ala. 1939), 237 Ala. 253.

Millerick v. Benefit Assn. of Rwy. Employees, 161 S.W. (2) 205 (Sup. Ark. 1942).

Brown v. State Auto. Assn., 12 N.W. (2) 712.

Easter v. Brotherhood of American Yeomen, 157 S.W. 992 (Kans. C.C.A. 1913).

Green v. Hartford Life, 51 S.E. 887 (Sup. Ct. N.C. 1905).

Mutual v. Phinney, 178 U.S. 327 (C.C.A. 9th, 1900).

Home Mutual v. Swagerty, 270 S.W. 527 (Sup. Ark. 1925).

Roth v. Mutual Reserve Life, 162 F. 282 (C.C.A. 8th, 1908).

Mutual v. Sears, 178 U.S. 345 (C. C.A. 9th, 1900).

Weston v. State Mutual Life, 84 N.E. 1073 (Sup. Ill. 1908).
Lee v. Mo. State Life, 261 S.W. 83 (Sup. Mo. 1924).

The following cases are a few of those where the courts have held that the policy had not been abandoned:

Manhattan Life v. Wright, 126 F. 82 (C.C.A. 8th, 1903).
Myers v. Jefferson Standard, 271 S.W. 217 (Ct. Civil App. 1925).
Goepper v. Travelers, 207 Ill. App. 319 (1917), Cert. den. by Sup. Ct.
Johnson v. Hartford, 197 S.W. 132 (Sup. Mo. 1917).
Wayland v. Western Life, 148 S.W. 626 (Kans. C.C.A. 1912).
Reynolds v. Metropolitan, 185 P. 1051 (Kans. Sup. 1919).

Time is material and of the essence of contract. Non-payment of premiums when due involves absolute forfeiture if such be the terms of the contract.

Section 4 of the policy provides:

"If any such premium is not paid when due, this policy shall cease, subject to the values and privileges hereinafter described, except that a grace period of thirty-one days, during which the policy shall remain in force, will be allowed • • • •.

In *New York Life Insurance Co. v. Statham*, 93 U.S. 24, 23 L. Ed. 789, the Court held:

"But the time of payment in such policies is material, and of the essence of the contract; and failure to pay involves an absolute forfeiture which cannot be relieved against in equity." (Syl. 2).

In its opinion the Court said:

"All the calculations of the insurance company are based on the hypothesis of prompt payments. They not only calculate on the receipt of the premiums when due, but on compounding interest upon them. It is on this basis that they are enabled to offer assistance at the favorable rates they do. Forfeiture for non-payment is a necessary means of protecting themselves from embarrassment. Unless it were enforceable, the business would be thrown into utter confusion. There must be power to cut off unprofitable members, or the success of the whole scheme is endangered. The insured parties are associates in a great scheme. This associated relation exists whether the company be a mutual one or not. Each is interested in the engagements of all; for out of the coexistence of many risks arises the law of average, which underlies the whole business. An essential feature of this scheme is the mathematical calculations referred to, on which the premiums and amounts assured are based. And these calculations, again, are based on the assumption of average mortality, and of prompt payments and compound interest thereon. Delinquency cannot be tolerated nor redeemed, except on the option of the company."

In *Klein v. New York Life Insurance Company*, 104 U.S. 88, 25 L. Ed. 662, the Court held:

"The provision for the release of an insurance company from liability on a failure of the insured to pay the premiums when due, is of the very essence and substance of the contract of life insurance." (Syl. 1).

"To hold the company to its promise to pay the insurance, notwithstanding the default of the assured in making punctual payment of the premiums is to destroy the very substance of the contract. This a court of equity cannot do." (Syl. 2).

In *Bach v. Western States Life Insurance Company*, 51 Fed. 2d 191 .(10th C.C.A.), the Court held:

"Insurer, applying cash reserve of life policy to payment of loan and extended insurance, was not liable on policy thereafter lapsing before insured's death." (Syl. 1).

"Regular payment of premiums on life policy is very essence of agreement." (Syl. 3).

In its opinion the Court said:

"At the end of the eighth policy year, the policy carried a cash value of

$825 and an extended insurance for 7 years and 204 days (which extends beyond the date of the death of the insured). However, on June 9, 1922, the insured availed himself of the loan provisions of the policy and borrowed $601.80, and executed a loan agreement by which the insured agreed * * *."

The Court further said:

"The premium of $182, due May 10, 1923, was never paid, notwithstanding the company sent the insured eight notices of the delinquency. Neither did the insured pay any part of the principal or interest of the loan of $601.80. On June 11, 1923, the company charged the then due and unpaid loan of $601.80 against the reserve value of $825; the balance of $223.20 was applied to automatic term insurance which expired July 2, 1925, which was two years prior to the death of insured. If the company had the right to charge this note against the reserves on the policy, which was the sole security for the loan, the trial court was right. If it did not have such right, then plaintiff is entitled to recover.

"The action of the company was in accord with the contract of the parties."

Bergholm v. Peoria Life Insurance Co., 76 L. Ed. 416, 284 U.S. 489:

"The condition in a policy of life insurance that the policy shall cease if the stipulated premium shall not be paid on or before the day fixed is of the very essence and substance of the contract, against which even a court of equity cannot grant relief." (Syl. 4).

In *Rummler et al v. Metropolitan Life Insurance Co.*, 316 Ill. App. 362, 45 N.E. 2d 86, the Appellate Court of Illinois held:

"Under life policy stipulating for payment of premiums on certain day and for forfeiture on default of punctual payment, time is material and of the essence of the contract, and nonpayment on the day stipulated involves absolute forfeiture." (Syl. 1).

In *Harrell v. Bankers Mutual Life Co. of Freeport*, 302 Ill. App. 374, 23 N.E. 2d 818, the Court held:

"An insurance policy is a 'contract' and must be interpreted and construed by the same rules as other mercantile contracts." (Syl. 2).

"Where insured failed to pay premiums provided for by policy, insurer should be given right to terminate insurer's liability by proper notice." (Syl. 6).

"An insurer's refusal to notify beneficiary or insured's wife of due dates of premiums under life policy did not estop insurer from forfeiting policy for non-payment of premiums by insured." (Syl. 8).

Failure to protest forfeiture made on ground that indebtedness exceeded cash value or to tender premium forfeits policy.

In the case of *Daggett v. Prudential Life Ins. Co.*, 166 So. 405 (Miss.), the Supreme Court of Mississippi said:

"* * * The insured made no protest, did not offer to pay any sum at any time thereafter, nor was any effort made to pay any sum to the date of the filing of this bill. * * *

"In the case at bar, when the insured was notified by the insurer that her policy had been canceled, it was her duty, when the time came to make payment of another premium, to make protest, or tender payment. She never uttered a word, and everything she did was calculated to lead the insurer to believe that she acquiesced in the cancellation. She never paid a dollar, or offered to pay anything. * * * She did not pay, and it is not asserted that she was ready, willing and able to pay. On the contrary, it is fair to assume that while she was living she had borrowed the full face value of the policy, and that by her silence and her absolute non-action in reference thereto, she acquiesced in the cancellation of her policy. * * *"

In *Davis v. Acacia Mutual Life Ins. Co.*, 181 S.E. 12 (S. Car.), the Supreme Court of South Carolina held:

"Insurer's practice over period of years to add interest to amount of loan

held not waiver of insurer's right to require payment of interest in advance, and to cancel policy on insured's failure to pay interest, where loan and interest exceeded reserve value of policy." (Syl. 9).

In *Missouri State Life v. Ross*, 48 S.W. 2d 231 (Ark.) it was held:

"Insured's failure to object to correctness of insurer's notification of lapse of policy constitutes acquiescence in forfeiture of policy.

"Where insured acquiesced in application of 'automatic premium loan' to payment of premiums, beneficiary could not contend that cash surrender value should have been used in such manner as to continue policy in force until after insured's death."

ESTOPPEL

On the question of estoppel, the Circuit Court of Appeals (4 C.C.A.) in *Massachusetts Mutual Life Insurance Co. v. Jones*, 44 F. 2d 540, held, in denying recovery to a beneficiary, where the insured had requested in his application the "automatic premium loan" and where the company had complied and had paid several premiums by the automatic premium loan method:

"The effect of its (Company's) doing so was to continue the life of the policy and this was precisely what the insured intended to happen in his selection of the automatic provision. If insured had then and there repudiated this action, * * * but he did nothing of the sort, but, with full knowledge of the company's interpretation of the contract and its action thereunder, accepted the benefits, which the action taken conferred, and upon natural principals of equity, is bound * * * and by the same token, his beneficiary likewise is estopped to complain."

It was held in *Craig v. Golden Rule Life Insurance Co.*, 41 S.W. 2d 769 (Ark.):

"Beneficiaries in life policy must stand in shoes of insured and will be bound by the terms of policy issued. Construction of parties is entitled to great weight in correct interpretation of life policy."

There are, of course, many more authorities which could have been analyzed herein; however, space will not permit. The case as stated at the outset of this article is pending in a certain Federal District Court. It may, of course, ultimately find its way into the reports; if it does, it will be easily recognized from these facts.

II
UNREASONABLE DELAY IN PRESENTING CLAIM AND PROOF WITH RESPECT TO DISABILITY AND WAIVER OF PREMIUMS

Before analyzing the cases bearing on "unreasonable delay," it is necessary to direct attention to the fact that there are two lines of decisions on the question of when the time of waiver of the payment of premium begins, under policy provisions.

(a) One line of decisions hold that "proof of disability" fixes the time when the waiver begins.

(b) The other line of decisions hold that the time of "waiver" is the time the "disability begins," and that a reasonable time thereafter is allowed to make proof of such disability.

Cases adhering to the first principle, "Receipt of Due Proof."

Bergholm v. Peoria Life Ins. Co., 284 U.S. 489, 76 L. Ed. 416; *Same v. Same*, 50 F. 2d 67.

Nalley v. New York Life Ins. Co., 48 F. Supp. 470.

Kantor v. New York Life Ins. Co., 258 N.W. 759 (Ia.)

Reed v. New York Life Ins. Co., 268 N.W. 290 (Nebr.)

Saul v. New York Life Ins. Co., 92 F. 2d 665 (5th C.C.A.)

Lindskog v. Equitable Assurance Society of U. S., 295 N.W. 70 (Minn.)

Policy provisions vary in the language used therein pertaining to the agreement to pay benefit for total and permanent disability and for waiver of premiums. A typical provision found in those policies which make the payment, and waiver conditioned on "proof of disability received at the Home Office, etc." and which provision is very ably discussed in *Nally v. New York Life Insurance Co.*, 48 F. Supp. 470 is:

"Upon receipt at the Company's Home Office before default in payment of premium of 'due proof' that the insured is totally and presumably permanently disabled and that such disability occurred after the insurance took effect and before its anniversary on which the insured's age at nearest birthday is sixty years, the following benefits will be granted: (a) Income payments, (details need not be stated here); (b) The Company will waive payment of any premiums falling due after approval of said proof and during disability. * * * In the event of default in payment of premiums after the insured has become totally disabled, the policy will be reinstated upon payment of the arrears of premiums, with interest at 5 per cent, provided due proof * * * is received by the company not later than six months after default, and the benefits under this section shall then be the same as if said default had not occurred."

45 C. J. S., Sec. 1066, p. 1298, states the rule:

"Where the policy provides that notice and proof of disability must be furnished while the policy is in force, or before default in payment of premium, the filing of notice and proof while the policy is in force, or before default in payment of premium, is a condition precedent to liability. But where the policy merely requires that the disability occur while the policy is in force or before default in payment of premiums, the filing of notice and proof while the policy is in force or before default is not a condition precedent to liability."

Typical of the provision used in some policies and upon which the courts have held that receipt by the Company of notice and proof of disability while the policy is in force or before default is not a condition precedent to liability, and which was the subject of interpretation in *Viles v. Prudential Insurance Co. of America,* 96 F. 2d 3 (10 C.C.A.).

"If the insured shall become totally and permanently disabled either physically or mentally from any cause whatsoever to such an extent that he or she is rendered wholly, continuously and permanently unable to engage in * * * and if such disability shall occur at any time after the payment of the first premium on this policy while this policy is in full force and effect and the insured is less than 60 years of age and before any forfeiture provisions shall become operative, the Company, upon receipt of due proof of such disability, will grant the following benefits:

"(a) Waiver of premiums (details not necessary here).

"(b) Monthly income (details not necessary here) * * * such disability shall be presumed to be permanent and the Company will, upon receipt of such proof, grant the disability benefits provided, * * * any disability benefits granted in accordance with the provisions of the clause headed Provisions As to Total and Permanent Disability, including these provisions will be granted from the commencement of total and permanent disability as defined, any other provisions in said clause to the contrary notwithstanding."

Cases adhering to the principle "that the time of waiver is when the disability begins, and that proof may be made within a reasonable time thereafter."

Minnesota Mutual Life Insurance Co. v. Marshall, 29 F. 2d 977 (8th C.C.A.).

Lydon v. New York Life Ins. Co., 89 F. 2d 78 (8th C.C.A.) (Certiorari denied).

Home Life Insurance Co. v. Keys, 62 S.W. 2d 950 (Ark.).

Life Insurance Co. of Virginia v. Williams, 172 S.E. 101 (Ga.).

Mid-Continent Life Ins. Co. v. Harrison, 53 P. 2d 266 (Okla.).

In the absence of a provision in the policy fixing the time for making proof of disability, the proof must be made in a reasonable time.

Viles v. Prudential Life Ins. Co. of America, 96 F. 2d 3.

Metropolitan Life Ins. Co. of America v. Henry, 24 N.E. 2d 918 (Ind.).

Metropolitan Life Ins. Co. v. Johnson, 12 N.E. 2d 755 (Ind.).

Brumit v. Mutual Life Insurance Co. of New York, 156 S.W. 2d 277 (Tenn.).

UNREASONABLE DELAY

In *Metropolitan Life Insurance Co. v. Johnson*, 12 N.E. 2d 755 (Ind.), it was held:

> "An unexplained delay of more than 3 years in giving notice of total and permanent disability under a group insurance policy amounts as a matter of law to failure to give notice within a reasonable time and prevents recovery."

The insurer, being wholly dependent upon the insured for information relative to the time liability to pay occurs, includes in the contract the requirement that it be notified of the happening of disability.

In the opinion of the Supreme Court of Indiana in the Johnson case, there is found this adequate statement:

> "It is the experience of every defender of causes that it is a matter of first importance to become possessed of all the material facts and the names and residences of all known witnesses at the earliest possible time, as facts may be forgotten or distorted, and witnesses may go beyond reach. Requiring the making of proof is an important provision, in that it is for the protection of the insured against fraudulent claims, and also against those which, made in good faith, are not valid."

In *McLawhorn v. American Cent. Life Insurance Co.*, 182 S.E. 139 (N.C.) 1935, the insured who was disabled in 1929 but continued to pay premiums on the policy and did not make claim or proof to the company until 1934, was estopped from maintaining action against the company for the period prior to making proof.

A delay of two years in making proof of disability was held to render the claim unenforceable and to sustain a non-suit in *DeWease v. Travelers Insurance Co.*, 182 S.E. 447 (N.C.) 1935.

The Nebraska Supreme Court held, in *Reed v. New York Life Insurance Co.*, 268 N.W. 290, that the plaintiff's claim for disability could not be maintained where first notice of claim and proofs were not submitted until after disability had ceased.

Recovery was denied the plaintiff in *Brumit v. Mutual Life Insurance Co. of New York*, 156 S.W. 2d 877 (Tenn.), where proofs of disability were not furnished for four years and nine months after insured had been fully advised as to his condition.

In *Hicks v. Mutual Life Insurance Co. of New York*, 83 F. 2d 275 (4th C.C.A.), recovery was denied to insured where suit was not commenced by him to recover disability benefits allegedly commencing on February 8, 1924, for ten years after the insurer ceased to make further payments (after November, 1924) and denied liability, the Court holding that the action was barred by the Statute of Limitations.

In *Kantor v. New York Life Ins. Co.*, 258 N.W. 759 (Ia.), it was held:

> "Executrix filing proof of insured's disability for period preceding insured's death held not entitled to recover disability benefits under life policy, where insured never filed proof of disability, though capable of doing so, and insurer was not notified of disability during insured's lifetime."

In *Anderson v. New York Life Ins. Co.*, 149 Pac. 2d 462, the California Court held:

> "Under life policies providing for disability benefits upon insurer's receipt 'before default in payment of premiums' of proof that insured 'is' totally disabled and that such disability 'will continue for life,' insured's failure to claim disability benefits during his lifetime barred his executrix from claiming such benefits."

For other cases see:

Kornegay v. Connecticut Gen., 93 S.W. (2) 164.

Warner v. Connecticut Gen., 194 S.W. (2d) 514 (Texas).

Fulton v. Metropolitan, (N.C. 1936).

Walton v. Metropolitan, 83 S.W. (2) 274.

Coburn v. Metropolitan, 91 S.W. (2) 157 (Mo.).

Hogan v. Lantry, 89 S.W. (2) 522-9 (Mo.).

Tucker v. Aetna, 182 S.E. 439 (S. C.).

Milan v. Equitable, 183 S.E. 865 (W. Va.).

Broom v. Standard Acc., 71 So. 653 (Miss.).

Michaelson v. Equitable, 161 Misc. 697, 292 N.Y.S. 796.

Levitt v. Prudential, 150 Misc. 754 (N. Y.).

Metropolitan v. Brown, 177 So. 178 (Ala.).

Station v. Metropolitan, 119 S.W. (2) 30 (Mo.).

Gibson v. Equitable, 36 P. 2d 105 (Utah).

Smithart v. John Hancock, 71 S.W. 2d 1059 (Tenn.).

Kreinowitz v. N. Y. Life, 2 N.Y.S. 2d 826.

Metropolitan v. Lindsey, 185 So. 573 (Miss.).

New York Life v. Levine, 7 L.C. 825, 8 L.C. 40 (Fed. D.C., E.D. Pa. 1942).

Rogers v. Metropolitan, 122 S.W. 2d 5.

Corcoran v. Metropolitan, 93 S.W. 2d 1027.

Kendall, Admr. v. Travelers, 45 F. Supp. 956 (U.S.D.C. 1942).

The Committee hopes that the foregoing report, analysis of cases and discussion on the subjects covered herein will be of benefit to the insurance lawyer.

Respectfully submited,
John L. Barton, Chairman
T. DeWitt Dodson
Hobart Grooms
Dale C. Jennings
Frank T. Lloyd, Jr.
James E. Nugent
H. P. Osborne
Harry T. Poore
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Robert L. Webb
Paul J. McGough, Ex-Officio

Report Of Committee On Practice And Procedure

FOR the past two years your Committee has devoted itself almost exclusively to a study of the proposed amendments to the Federal Rules of Civil Procedure. These proposed amendments were prepared by the Advisory Committee on Rules for Civil Procedure, appointed by the Supreme Court of the United States.

In May, 1944 this Advisory Committee published a Preliminary Draft of Proposed Amendments affecting more than forty different rules. The open forum conducted by your committee at the last convention of our Association, held in Chicago in September, 1944, was devoted exclusively to a discussion of this first Preliminary Draft, particiular attention being given to the proposed amendments to Rules 14, 30, 33, 34, 41, 45, 50, 54 and 56. These discussions, and the criticisms and recommendations of your Committee on Practice and Procedure, are fully reported in the Insurance Counsel Journal for October, 1944, pages 32 to 58. Copies of this October, 1944 report were promptly forwarded to the Supreme Court's Advisory Committee.

Following a consideration by the Advisory Committee of the numerous criticisms, recommendations and suggestions submitted by members of the bench and bar throughout the United States, the Advisory Committee prepared and published in May, 1945 a Second Preliminary Draft of Proposed Amendments. While this Second Preliminary Draft ignored a number of recommendations theretofore made to the Advisory Committee by your Committee on Practice and Procedure, some of the changes which we advocated were in fact embodied in such Second Preliminary Draft.

This Second Preliminary Draft made substantial changes in the proposed amendments contained in the First Preliminary Draft, particularly those relating to Rules 12, 13, 26, 33, 36, 41, 45, 50, 54, 56, 60 and 73. However, the Second Preliminary Draft made no change in the much discussed and widely criticized proposed amendment to Rule 30 (b) relating to "Depositions Upon Oral Examination"; nor did it make any important change in the severely criticized proposed amendment to Rule 34 relating to "Discovery and Production of Documents and Things for Inspection, Copying, or Photographing." Because of the "tie-in" between proposed Rules 26 (b) and 30 (b) relating to depositions, proposed Rule

33 relating to interrogatories, and proposed Rule 34 relating to the production and inspection of documents, each of these proposed Rules is of tremendous importance to trial lawyers generally, and particularly to insurance counsel. Consequently, your Committee on Practice and Procedure has concentrated its efforts during the past few months toward the securing of some relief from the harshness and oppressiveness of the proposed amendments to Rule 26, 30, 33 and 34 set forth in the Second Preliminary Draft. See the discussion of these Rules in the Insurance Counsel Journal for January, 1946, pages 23 to 29.

We are happy to report that these efforts of your Committee have not been in vain. Mr. William D. Mitchell, Chairman of the Supreme Court's Advisory Committee, has notified us that his Committee has decided to recommend to the Supreme Court that there be added to the present Rule 30 (b) the following:

"The court shall not order the production or inspection of any writing obtained or prepared by the adverse party, his attorney, surety, indemnitor, or agent in anticipation of litigation or in preparation for trial unless the court is satisfied that denial of production or inspection will unfairly prejudice the party seeking the production or inspection in preparing his claim or defense or will cause him undue hardship or injustice. The court shall not order the production or inspection of any part of the writing that reflects an attorney's mental impressions, conclusions, opinions, or legal theories, or, except as provided in Rule 35, the conclusions of an expert."

That this suggested addition to Rule 30 (b) is due in no small measure to the work of the International Association of Insurance Counsel is made manifest by the following quotation from a letter by Mr. William D. Mitchell to your Chairman:

"••• You will see that in making this draft the Committee had before it the recommendations of your committee, and to a substantial degree adopted your suggestion.

"The other rules relating to discovery were modified where required to refer back and embody the protection provisions in Rule 30 (b), including the new one above quoted."

While the Advisory Committee failed to adopt some of our recommendations regarding Rules 26, 30, 33 and 34, we are indeed highly pleased with this proposed modification of Rule 30 (b). Because of the "tie-in" between proposed Rules 26, 30, 33 and 34, the adoption by the Supreme Court of this proposed modification will, we believe, eliminate many abuses arising under those particular Rules.

The Chairman of the Advisory Committee informs us that the Advisory Committee has now completed its work on the proposed amendments to the Federal Rules of Civil Procedure, and that said Committee expects to make its final report to the Supreme Court at an early date. In other words, the Advisory Committee does not plan to submit its final draft of proposed amendments to the bar for further study. These developments would seem to make unnecessary at this time any further study by your Committee of the proposed amendments. If and when these proposed amendments are adopted by the Supreme Court, it may become advisable for the Committee to study the operation of the new Rules. In the meantime, your Committee on Practice and Procedure expects to turn its attention to other matters.

Your Committee has arranged what we believe will be a very interesting and instructive program for the annual meeting to be held at Galen Hall Hotel and Country Club, Wernersville, Pennsylvania, on September 4, 5 and 6. Elsewhere in this issue of the Journal you will find the program of the Committee on Practice and Procedure fully set forth. A large attendance at this open forum is confidently expected.

Respectfully submitted,

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Report Of Committee On Workmen's Compensation And Unemployment Insurance

NEITHER Workmen's Compensation nor Unemployment Compensation are strictly or technically *Insurance* as lawyers think of it; nevertheless, both are subject matters deserving of our careful study and consideration.

In retrospect, this Committee under our good Brother Cope wisely chose the topic "Inflation" last year as applicable to compensation in fixed sums coming in lieu of wages to the disabled and unemployed. It was then a timely subject, is more so this year and will become most timely as long as we have the present trend.

While both Workmen's and Unemployment Compensation payments are dependent upon the laws of each of the several states, the theory underlying each of the subjects in all the states is basically the same and is well understood. We are, therefore, submitting for our report some legal research and general comment observations of the individual members of the committee on recent cases in these fields rather than a development of one phase of the subject.

On April 22, 1946, the Supreme Court of the United States, affirming 391 Ill. 29, 62 N.E. (2d) 537, in *People of the State of Illinois, ex rel. its Director Labor, v. United States of America,* 90 L. Ed., 838, distinguishing three of its former important decisions, held that state unemployment compensation tax claims are not entitled to priority, in distributing estate of insolvent, over tax claims of the United States. The decision, with no dissenting opinion, resolved finally the claim of the United States for federal unemployment compensation taxes and federal insurance contributions taxes under the Social Security Act as prior to and requiring payment in full before the State of Illinois could recover amounts due as taxes under its Unemployment Compensation Act, and in effect reversed *Rivard v. Bijou Furniture Co.*, 67 R. I. 251, 68 R. I. 358.

The Supreme Court of Ohio has denied unemployment compensation to claimants several times recently. In *Kut v. Markets, Inc.,* 146 O.S. 522, the claimant refusing to work on the Seventh-Day Sabbath (Saturday) was refused unemployment benefits because his right to religious freedom was not affected when he refused former position and he did quit work. Later in May, 1946, the same result was obtained in the case of *Chambers v. Owens-Ames-Kimball Co. and Board of Review,* 146 O.S. 559, when the majority held a union carpenter could not claim benefits because unless he refused to work he would be denied the right to retain membership in and observe the rules and benefits of his labor organization.

Then on May 29, 1946, this Court rendered a unanimous decision in a very important case wherein the two lower courts had reversed the Board of Review of the Bureau of Unemployment Compensation denying unemployment benefits to members of the United Mine Workers of America during negotiations between coal mining workmen and operators wherein the operators urged the workmen to continue production on the same basis and conditions as incorporated in a definite prior agreement of another District and this No. 6 District. The Ohio Supreme Court reversed both lower courts, holding (146 O.S. 600 at 605) that "the Unemployment Compensation Act was not designed to provide benefits for those wilfully idle or voluntarily and purposely unemployed." The opinion (*Baker v. Powhatan Mining Co.*) at page 608 *et seq.,* reviews numerous cases involving either "strikes" or "labor disputes". It was held that under the clear and explicit terms of the statute the miners precluded themselves from receiving unemployment compensation when they refused the opportunity to continue or resume employment at the very same work previously performed by them and under the same terms and conditions which had prevailed for two years (617). The benefits were intended to cover losses suffered from unemployment not through any fault or choice of their own but because they became the unfortunate and unwilling victims of adverse business and industrial conditions (605).

Without doubt this opinion by Judge Matthias, concurred in by all his six associates, including the Chief Justice, covers a subject matter of national importance to many workmen headed by this widely known national leader or the several labor leaders. Because "strikes" are so crippling at this time, we take the liberty of quoting the syllabus of the decision in its entirety:

1. The underlying purpose of the Unemployment Compensation Act is to lighten the burdens which had theretofore fallen upon workmen and their families by reason of adverse business and industrial conditions which caused unemployment, and it was designed for the benefit of those whose loss of employment is involuntary and not those who are wilfully and purposely unemployed.

2. Under the provisions of Section 1345-6, General Code (118 Ohio Laws, 266), as in force and effect prior to the amendment thereof effective October 1, 1941, no benefits were payable "to any individual who has lost his employment or has left his employment by reason of strike in the establishment in which he was employed, as long as such strike continues."

3. In the absence of any definition of the intended meaning of words or terms used in a legislative enactment they will, in the interpretation of the act, be given their common, ordinary and accepted meaning in the connection in which they are used.

4. The universally understood meaning of the term "strike" is that it is a concerted or general quitting of work by a body of employees in order to coerce their employer or employers in some way, as when higher wages or shorter hours are demanded, or a reduction of wages is resisted; any general refusal to work as a coercive measure.

5. Employees have the right to insist upon better terms and improved working conditions and also the right singly or collectively to refuse to continue work for the purpose of obtaining the terms and conditions demanded by them. But collective and concerted discontinuance of work for the purpose stated constitutes a strike, and under the clear and express provisions of Section 1345-6, General Code, as in force and effect prior to the amendment thereof effective October 1, 1941, any employee who "has lost his employment or has left employment by reason of strike in the establishment in which he was employed," was precluded from receiving unemployment compensation during the period of such unemployment."

A new field known as second injury fund legislation is being considered in some of the states, and in others where such legislation has been enacted amendments are being considered. Such fund would facilitate the employment of handicapped workers, especially those made so as a result of their services in the armed forces. Within the next few months probably, or at least very soon, there will be considered new legislation in some states and matters of interpretations before the courts on legislation recently enacted where unemployment benefit laws covering benefits for sickness have been enacted.

In the field of unemployment insurance, there is an increasing trend towards extending unemployment insurance benefits to cover unemployment caused by non-industrial sickness and accidents. This movement started in Rhode Island several years ago when it enacted what has become known as the Cash Sickness Law. In that state, employees contributed 1% of wages to the Unemployment Insurance Fund. This 1% contribution was diverted to a fund to be used for the payment of benefits for unemployment caused by sickness or accident. Space does not permit a detailed discussion of the experience under that law, but all indications point to an ultimate insolvency of the Fund if the present ratio of payments of benefits to contributions continues. As evidence of this, the Commission appointed this year to study the law recommended that the rate of contribution be increased to 1½% and that certain restrictions be made in the payment of benefits under the Cash Sickness Law where benefits are also payable under the Workmen's Compensation Law. These recommendations were enacted into law.

In California, a law providing for cash sickness benefits was enacted this year. Under the Unemployment Insurance Law of that state, employees also contribute 1% to the Fund which has now been diverted

to maintain the Cash Sickness Fund. While there are many differences between the California and the Rhode Island Laws, the principal difference is that under the California Law so-called "Voluntary Plans" underwritten by private insurance are authorized. Employees insured under a Voluntary Plan are now required to make contributions to the State Fund and employers may not deduct from employees' wages under the Voluntary Plan more than what the employee would contribute under the state plan. Many difficulties in the writing of such Voluntary Plans by private insurance are already becoming apparent. It will be of interest to see to what extent private insurance can operate in competition with the state under the California Law and as this law does not take effect until May of 1947, the feasibility of underwriting such Voluntary Plans will not be determined until some time after that date.

Cash sickness bills were also introduced this year in Massachusetts, New York and New Jersey. In the latter state, employees contribute to the Unemployment Insurance Fund and it was similarly proposed that this contribution be diverted for the payment of benefits for cash sickness. There was also introduced at the very close of the session a bill recommended by a commission to study the subject which would have imposed an obligation on employers to pay sickness benefits, and permitted them to discharge this obligation by direct payments, self-insuring, or insurance. In New York, the bill proposed that the Fund be supported by contributions from both employers and employees.

It becomes increasingly evident that in those states where the employees contribute to the Unemployment Insurance Fund, attempts will be made to divert these contributions to a fund for the payment of sickness benefits. Even in those states where the entire contribution to the Unemployment Insurance Fund is made by employers, there is evidence that cash sickness fund legislation will be sponsored under a system requiring either contributions from employers or employees, or both.

So far as is known, the constitutionality of this legislation has not been tested and this is probably so because the only two states which have enacted such a law do not require any contribution from employers. There would seem to be at least some question as to the constitutionality of such a law where the employer was taxed in whole or in part. The constitutionality of state unemployment insurance laws was upheld in *Chamber v. Andrews,* 271 NY 1; 2 N.E. (2d) 22; affirmed without opinion by an equally divided Court in 57 S. Ct. 122, and in *Howes Bros. Company v. Massachusetts U. C. Commission,* 296 Mass. 271; 5 N.E. (2d) 720. Certiorari denied 57 S. Ct. 434. In those cases the law was sustained on the theory that it constituted a valid exercise of police power, and the tax on employers was upheld on the theory that there was such a relationship between employers and unemployment as to justify imposing the cost on them. In the New York case, the court said, "So likewise, employers generally are not so unrelated to the unemployment problem as to make a moderate tax upon their payrolls unreasonable or arbitrary." And in the Massachusetts case it was stated, "The connection between employers and unemployment is not remote and is affected by general business conditions" and again as follows: "The principle is familiar that, within reasonable limits, the legislative department of government in mitigation of a public evil may place the cost on those in connection with whose business the evil arises."

As it is difficult to perceive any connection between non-occupational accidents and illness to employment, it is difficult to see how a law imposing a tax on employers for sickness benefits could be sustained under the reasoning of these decisions.

On the other hand, in *Carmichael, Attorney General of Alabama, et al. v. Southern Coal and Coke Company,* 301 U. S. 495, the court apparently sustained the validity of the Alabama Unemployment Insurance Law merely on the theory that the tax on employers was a proper exercise of the states's tax power, the court saying, "Nothing is more familiar in taxation than the imposition of a tax upon a class or upon individuals who enjoy no direct benefit from its expenditure, and who are not responsible for the condition to be remedied." If the court adheres to this theory, then the question as to the validity of a tax on employers for the payment of sickness benefits would seem to be answered in the affirmative.

In the not too far distant future the unemployment benefit legislation considered

or enacted will become of greatest importance. We are not prophets but this country has not always been in prosperity. Even now some of the reemployment service division of our selective service board of the United States Army are referring the returned veterans only to the Unemployment Commission Boards, whereas some of such members are really expending effort and finding them work in lines in which they are acquainted or to which they might well be adapted. If we were to examine the work done and money expended by these Unemployment Boards, we would instantly realize its immediate importance.

Turning and alluding to Workmen's Compensation, probably no subject today is as important as the extra territorial effect of the laws of the state governing such benefits—not a new subject at all, but a constantly growing one, and necessarily so. Such a study would be illuminating but entirely too extensive.

Another subject which has challenged the attention of the highest courts of two of our large and important states (Michigan and Minnesota) is the legislative establishment of medical commissions whose reports must be accepted by the compensation boards. Both of these legislative enactments were found to be unconstitutional for the same and very manifest reason that the evidence considered in the determination by the Commission is not a part of the complete record either for review or available to all the parties.

On April 1, 1946, all members of the Supreme Court of Michigan (opinion by Justice Carr) concurred in *Dation v. Ford Motor Co.*, 22 N.W. (2d) 252, in holding (Syl. 7, 8 and 9):

"Question of constitutionality of sections of Workmen's Compensation Act making medical board's report on occupational disease final and conclusive was considered on appeal from its finding against plaintiff even though the question had not arisen in the proceedings before appeal, since the question was one involving administration of the Workmen's Compensation Law.

"Employee was not estopped to question validity of section of Workmen's Compensation Act providing that report of medical commissioners with respect to alleged occupational disease shall be final and conclusive, where amendment making acceptance of Workmen's Compensation Law compulsory as to both employer and employee was in effect at time employee terminated employment.

"Section of Workmen's Compensation Law providing that report of medical commissioners with respect to alleged occupational disease shall be final and conclusive is unconstitutional as denying due process, since Legislature cannot circumscribe judicial power of the courts by making the factual findings of its agencies conclusive, even though the findings are wrong."

Plaintiff was an employee for over twenty years. During the last three years he suffered disability, claiming a chest condition, and made application for compensation because of disability allegedly due to an occupational disease. As a foundryman exposed for years to employment hazards including dusts he claimed disability by reason of pneumoconiosis. The medical commission appointed pursuant to special provisions of the Michigan Act found that plaintiff did not have the foregoing disease but had x-ray and clinical evidence of tuberculosis. The latter was not compensable; the former was. The medical commission's report was final and conclusive with respect to the presence or absence of such occupational disease.

Many questions were raised but primarily the court held the constitutionality could be raised in this situation of total denial for the first time; that the litigant was deprived of the right to a proper hearing of the issues in his case and of judicial review of the reasonableness of the determination by an administrative board; and that the appointment of such medical commission, the findings of which were final and conclusive, was based on legislation unconstitutional as to that portion only where the main commission (Department of Labor and Industry) acts in a fact-finding capacity with its power and duties merely quasi-judicial.

Only Michigan authorities were reviewed but at the end (p. 258) reference is made to *Dairy v. Agnew*, 16 F. Supp. 575 aff. 300 U.S. 608, as follows:

"It is true that if a Legislature attempts to make the findings of fact of

its agencies conclusive, even though the findings are wrong and constitutional rights are invaded, the legislative action is invalid for the judicial power of the courts cannot thus be circumscribed."

Substantially the same question was similarly decided in July, 1945, unanimously by the Minnesota Supreme Court, in *Hunter v. Zenith Dredge Co., et al.*, 19 N. W. (2d) 795, even though no reference to this decision is made in the later opinion of the Michigan Court. Certainly the Compensation Boards and/or Commissions, employers generally and insurance carriers must be interested. Here the referee determined no accidental injury had been sustained and a medical board was appointed under authority of special legislation to determine whether the employee was afflicted with an occupational disease. The medical board reported his being affected with synovitis of the right knee, not an occupational disease. The Commission felt bound by this report under the law making the medical board final judges of controverted medical questions but certified it unhesitatingly would have held the employee petitioner was disabled as a result of an occupational disease. The medical board files a report only, and does not testify or determine upon testimony given before the referee. Even a neutral physician appointed by the board would have been subject to cross-examination but none was necessary here.

"Due process of law" was not accorded Hunter, the employee, and both the Zenith Company and the Ford Company in the Michigan case in rather unusual cases as to facts were defeated on this legal principle.

"The provision for the creation of a medical board empowered to report to industrial commission findings on medical issues on a claim for compensation for occupational disease, which findings are made binding on commission, but which provision does not require the filing with the commission a transcript of evidence upon which findings are based, thereby removing method by which Supreme Court may determine whether findings are arbitrary and effectively blocking claimant's right to appeal is unconstitutional as a denial of due process of law." (Syl. 3).

Justice Gallagher adds some interesting comments based on Connecticut decisions as to what are occupational diseases (page 802). This question as well as the foregoing constitutional question should be enlarged before our Association members to constitute a study or discussion of the law of each of the several states.

Let not any of our members feel that, notwithstanding neither Workmen's Compensation nor Unemployment Compensation is strictly insurance, nevertheless the problems are multiplying and as general practitioners or insurance lawyers, there are many new questions constantly arising which are not only very unique but most interesting.

A matter of national importance was the East Ohio Gas Company fire disaster in Cleveland in October, 1944. The Gas Company was a self-insuring employer under Section 22 of the Act and in the case of *State, ex rel. Turner v. Industrial Commission of Ohio*, 145 O.S. 608, sought by mandamus to have the Commission pay its death awards of the many employees killed in an action by the widow of one on the theory that the Commission had on hand a large surplus or catastrophe fund, and under Ohio General Code, Section 1465, Subsections 68 and 72, it was claimed that when the death awards in one catastrophe amounted to over $15,000.00 and under Subsection 54 the Commission had a surplus of over $100,000.00 and that surplus was enough to take care of such claims, the same should be paid by the Commission. The writ of mandamus was, however, denied, and the demurrer to the petition sustained on several theories, not the least of which was that the self-insuring employers enjoyed benefits denied the state risk employers.

State risk employers likewise have their troubles. The Copperweld Steel Company has an industrial plant at Warren, Ohio. Six of its employees were killed while riding an automobile returning from their work at the plant to their homes after their work was concluded when the automobile in which they were riding was struck by a freight train at a grade crossing in the public highway some 700 feet away from the plant. The death claims were allowed even though the deaths were not sustained in the course of their employment. The employer thereupon filed an

application before the Commission to vacate the order of allowance and seeking a disallowance of the claims and the suit reported in 142 O.S. 439 of *Copperweld Steel Company v. Industrial Commission of Ohio* was thereupon instituted by way of writ of prohibition to prevent the Commission from carrying out and satisfying the awards. Following denial of the petition by the sustaining of the demurrer by a unanimous court, the Steel Company thereupon by an amendment to the petition (143 O.S. 591) set forth additional facts showing how its premium rate was affected by the allowance of these claims and also its merit rating credit and prayed that unless the orders of the defendant were vacated or reviewed or the Commission was prohibited or enjoined from enforcing them, the Steel Company would suffer irreparable damage. The demurrer to this amendment to the petition was sustained by a divided court (five to two). It is interesting to note that on Page 596, the majority opinion concludes with these words:

> "The plaintiff could refuse to pay a premium assessed against it and upon suit to recover the same, make its defense, if any it has."

The Supreme Court apparently was not familiar with the numerous occasions when the Commission has told self-insuring employers that if the orders of the Commission as to them were not promptly complied with, that they had a mere license to be self-insuring employers and it would be revoked. The following language from the minority opinion on Page 601 in answer to the foregoing sentence statement from the majority opinion is very interesting:

> "This court has never squarely decided whether the complying employer has a remedy. It would seem from one statement in the majority opinion that the remedy of the complying employer under such circumstance is to refuse to pay the premium assessed by the commission and when suit is instituted to collect such premium the complying employer may make a defense if he has one.
>
> If that be his exclusive remedy then in my judgment the complying employer is not afforded the equal protection of the law."

The minority opinion goes on further to say on page 602 that if the employer is relegated only to the remedy that he must be sued for his premium, his cause is lost because he admittedly owes all of the premium except the portion in controversy which is challenged by this special action as relating to the facts above. Even the minority opinion does not touch upon the fact that the Commission would not institute a suit against a self-insuring employer solely for the purpose of collection of premium, but would put into effect the more effective remedy of revoking the self-insuring employer's license.

To all the members of the committee contributing and giving consideration to our problems we are indeed grateful which does not include our brother Pierson of Oklahoma who is seeking elevation to the Supreme Court of Oklahoma where neither accident nor unemployment can strike and compensation is sure, but where controversies, although determined, go on *ad infinitum* as shown by the last quoted opinion.

This report is neither a survey nor a study and does not claim to touch broadly upon the decisions of the numerous states and the federal courts during the last two years, but is a mere fingerprint of but a few of the interesting questions raised and their importance.

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